Office-Supreme Court, U.S.
FILED
OCT 22 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-11
IN THE

Supreme Court of the United States

OCTOBER TERM 1980

J. GREGORY MERRION and ROBERT L. BAYLESS, d/b/a MERRION and BAYLESS, JEROME T. McHUGH, CHACE OIL COMPANY, DUGAN PRODUCTION CORPORATION, CONSOLIDATED OIL AND GAS, INC., SOUTHLAND ROYALTY COMPANY, TESORO PETROLEUM CORPORATION, AMERADA HESS CORPORATION, SUPRON ENERGY CORPORATION, ENERGY RESERVES GROUP, INC. J. M. HUBER CORPORATION, CONTINENTAL OIL COMPANY, (NOW CONOCO INC.), ATLANTIC RICHFIELD COMPANY, PHILLIPS PETROLEUM COMPANY, TENNECO OIL COMPANY, GETTY OIL COMPANY, GULF OIL CORPORATION, MOBIL OIL CORPORATION, AND OXY PETROLEUM, INC.,
Petitioners,

v.

JICARILLA APACHE TRIBE, JICARILLA APACHE TRIBAL COUNCIL, AND CECIL ANDRUS, SECRETARY OF THE INTERIOR,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RESPONSE OF PETITIONERS TO SUPPLEMENTAL BRIEFS OF RESPONDENTS

JASON W. KELLAHIN
KELLAHIN & KELLAHIN
P. O. Box 1769
Santa Fe, New Mexico, 87501
Telephone: (505) 982-4285

THOMAS H. BURTON
JOHN WIMBISH
P. O. Box 2197
Houston, Texas 77001
Telephone:
(713) 965-1030

BRUCE D. BLACK
CAMPBELL, BYRD & BLACK
P. O. Box 2208
Santa Fe, New Mexico 87501
Telephone: (505) 988-4421
Counsel for Petitioners

TABLE OF CONTENTS

	PAGE
Table of Authorities	ii
Response of Petitioners to Supplemental Briefs of Respondents	1
POINT I	
Indian Tribes are not authorized to exercise governmental powers of taxation over non-Indians operating on the Reservation under Federal Authority	2
POINT II	
The historical relationship between a specific Indian Tribe and the United States is significant in determining the Tribe's present Rights and Powers	8
POINT III	
Congress evidenced an intent through the passage of 25 USC §398c to allow States to tax oil and gas produced on Executive Order Indian Lands and to compensate the Tribes through royalties	11
CONCLUSION	14
Special appendix (supplement and modification of List of Subsidiaries and Affiliates of Corporate Petitioners)	S-1
Appendix	A-1ff.

TABLE OF AUTHORITIES

Cases

	PAGE
Barta v. *Oglala Sioux Tribe*, 259 F. 2d 553 (8th Cir.), cert. den. 358 U.S. 932 (1958)	6
British-American Oil Producing Co. v. *Board of Equalization*, 299 U.S. 159, reh. den. 299 U.S. 624 (1936)	9
Brown v. *Maryland*, 25 U.S. [12 Wheat.] 419 (1827)	5
Cannon v. *University of Chicago*, 441 U.S. 677 (1979)	12
Cherokee Nation v. *Southern Kansas Railway Co.*, 135 U.S. 641 (1890)	7
Commonwealth Edison Co. v. *Montana*, 450 U.S. . . . , 101 S. Ct. 2946, 69 L. Ed. 2d. 884 (1981)	2, 5
Crow Tribe of Indians v. *State of Montana*, 650 F. 2d 1104 (9th Cir. 1981)	12
McCulloch v. *Maryland*, 17 U.S. [4 Wheat.] 316 (1819)	5
Montana v. *United States*, 450 U.S. . . . , 101 S. Ct. 1245, 67 L. Ed. 2d 493 (1981)	2, 3, 4, 6, 7, 8, 9
Oliphant v. *Suquamish Indian Tribe*, 435 U.S. 191 (1978)	3, 9
St. Louis I. M. & S. R. Co. v. *United States*, 251 U.S. 198 (1920)	12
Sioux Tribe of Indians v. *United States*, 94 Ct. Cl. 150, *aff'd* 316 U.S. 317 (1942)	13
United States v. *Sioux Nation of Indians*, 448 U.S. 371 (1980)	9
United States v. *Wheeler*, 435 U.S. 313 (1978)	10
Washington v. *Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980)	8
Washington v. *Fishing Vessel Association*, 443 U.S. 658 (1979)	9

Statutes and Congressional Bills

	PAGE
25 USC § 232, 375, 416, 491, 589, 590c, 594, 609, 642, 648, 659, 668, 676, 690, 695, 749, 788, 882, 883, 898, 1087	9
25 USC § 319, 321	12
25 USC § 398c	9, 11, 12, 13
25 USC § 1271	9
S 876, S 1653, 68th Cong., 1st Sess. (1924)	11
66 Cong. Rec. 999 (1924)	11
66 Cong. Rec. 2799, 5433 (1925)	11
HR 9133, 69th Cong. 1st Sess. (1926)	11, 12
S 1722, 69th Cong. 1st Sess. (1926)	11
S 3159, 69th Cong. 1st Sess. (1926)	11
67 Cong. Rec. 10912, 10397 (1926)	11

Other

	PAGE
Choctaw and Chickashaw Permit Laws, 18 Op. Atty. Gen. 34 (1884)	5
Jicarilla Apache Tribes' Motion to Dismiss, Conoco v. Andrus, No. 80-261-C (D.N.M.)	5
Memorandum of the Solicitor to the Commissioner of Indian Affairs, June 3, 1941	5
Official Mexican Attitudes Toward the Indians: An Historical Essay, 54 Tul. L.R. 964 (1980)	7
Regulation of Traders on the Navajo Reservation, 60 I.D. 176 (1948)	5
Right of the Cherokees to Impose Taxes on Traders, 1 Op. Atty. Gen. 645 (1824)	5
Tenth Circuit Survey: Lands and Natural Resources, 58 Den. L. J. 415 (1981)	12
Transcript of Hearing, Southland Royalty Company v. Navajo Tribe, C-79-140 (D. Utah 1980), Argument on behalf of the Department of the Interior	5

No. 80-11

IN THE

Supreme Court of the United States

OCTOBER TERM 1980

J. GREGORY MERRION and ROBERT L. BAYLESS, d/b/a MERRION and BAYLESS, JEROME T. McHUGH, CHACE OIL COMPANY, DUGAN PRODUCTION CORPORATION, CONSOLIDATED OIL AND GAS, INC., SOUTHLAND ROYALTY COMPANY, TESORO PETROLEUM CORPORATION, AMERADA HESS CORPORATION, SUPRON ENERGY CORPORATION, ENERGY RESERVES GROUP, INC. J. M. HUBER CORPORATION, CONTINENTAL OIL COMPANY, (NOW CONOCO INC.), ATLANTIC RICHFIELD COMPANY, PHILLIPS PETROLEUM COMPANY, TENNECO OIL COMPANY, GETTY OIL COMPANY, GULF OIL CORPORATION, MOBIL OIL CORPORATION, AND OXY PETROLEUM, INC.,

Petitioners,[1]

v.

JICARILLA APACHE TRIBE, JICARILLA APACHE TRIBAL COUNCIL, AND CECIL ANDRUS, SECRETARY OF THE INTERIOR,

Respondents.

RESPONSE OF PETITIONERS TO SUPPLEMENTAL BRIEFS OF RESPONDENTS

[1] The parents, subsidiaries and affiliates of corporate petitioners are shown in the Special Appendix previously filed, as supplemented and modified by the Special Appendix hereto.

Petitioners file this response to the supplemental briefs filed by the Acting Solicitor General on behalf of the Secretary of the Interior and by the Jicarilla Apache Tribe.

POINT I

INDIAN TRIBES ARE NOT AUTHORIZED TO EXERCISE GOVERNMENTAL POWERS OF TAXATION OVER NON-INDIANS OPERATING ON THE RESERVATION UNDER FEDERAL AUTHORITY.

The Acting solicitor maintains that *Montana* v. *United States*, 450 U.S. . . . ., 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981) and *Commonwealth Edison Co.* v. *Montana*, 450 U.S. . . . ., 101 S.Ct. 2946, 69 L.Ed.2d 884 (1981) "reject at least some of the challenges previously interposed to the tribal tax under review." (Act.Sol.Supp.Br., p. 2) Petitioners disagree and would suggest that these cases reinforce the basic premise that Indians do not possess sufficient "inherent sovereignty" to exercise coercive governmental authority over non-Indians.

The Acting Solicitor maintains that *Montana* v. *United States* "seems to confirm tribal authority to tax non-Indians doing business within a reservation in circumstances like those presented here." (Act.Sol.Supp.Br., p. 2, n.1) Petitioners believe that *Montana* v. *United States* directly refutes the proposition that Indian tribes retain governmental authority over the territorial limits of their reservation and clearly holds that such tribes may "tax" non-Indians only under specific Congressionally delegated authority, proprietary rights or within "consensual relationships."[2] In considering the issue of whether the Crow Tribe or the State of Montana held title to the bed of the Bighorn River, the Court specifically referred to the ownership claims of both the State and the United States as deriving from their "governmental sovereignty":

---

[2] 450 U.S. . . ., 101 S.Ct. at 1258, 67 L.Ed.2d at 510.

> As a general principle, the Federal Government holds such lands in trust for future States, to be granted to such States when *they enter the Union and assume sovereignty* on an 'equal footing' with the established States. . . . But because control over the property underlying navigable rivers is so strongly identified with the *sovereign power of government, United States* v. *Oregon, supra,* 295 U.S. at 14, it will not be held that the United States has conveyed such land 'except because of some special duty or exigency' 450 U.S. . . . , 101 S.Ct. at 1251, 67 L.Ed.2d at 501-2. (emphasis added)

At the outset, however, the *Montana* Court made it clear that it did not view Indian tribes as possessing governmental status even remotely analogous to that of a State. Justice Stewart, writing for the Court, pointed out that, "through their original incorporation into the United States as well as through specific treaties and statutes, the Indian tribes have lost many of the attributes of sovereignty." 450 U.S. . . . , 101 S.Ct. at 1257, 67 L.Ed.2d at 509. He noted that although Indian tribes retain the power to prescribe and enforce internal laws which involve only *the relations among members of a tribe,* "[t]he areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving *the relations between an Indian tribe and non-members of the tribe.* . . ." 450 U.S. . . . , 101 S.Ct. at 1257, 67 L.Ed.2d at 509 (emphasis by the Court.)

Justice Stewart reasoned that, since *Oliphant* v. *Suquamish Tribe,* 435 U.S. 191 (1978) held Indian tribes cannot impose criminal sanctions against non-Indians, such tribes are divested of the power to adopt regulations which rely upon coercive sanctions against non-Indians.[3] He stated that there was no logical distinction between the divestiture of tribal criminal and civil jurisdiction over non-Indians:

---

[3] 450 U.S. . . . , 101 S.Ct. at 1258, 67 L.Ed.2d at 510, n. 14. This is also one of the infirmites of the Jicarilla Tax, see discussion, Merrion Brief In Chief, p. 40.

> Stressing that Indian tribes cannot exercise power inconsistent with their diminished status as sovereigns, the Court quoted Justice Johnson's words in his concurrence in *Fletcher* v. *Peck*, 6 Cranch 87, 3 L.Ed 162 — the first Indian case to reach this Court — that the Indian tribes have lost 'any right of governing every person within their limits except themselves.' *Id.*, at 147, *Oliphant* v. *Suquamish Indian Tribe, supra*, 435 U.S. at 209. Though *Oliphant* only determined inherent tribal authority in criminal matters, the principles on which it relied support the general proposition that *the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe*. 450 U.S. 101 S.Ct. at 1258, 67 L.Ed.2d at 510 (emphasis added).

Rather than confirming tribal authority to tax non-Indians, then, the Court in *Montana* clearly recognized the applicability of the total governmental framework created and limited by the United States Constitution; and the lack of any recognition of tribal governmental sovereignty therein.[4]

While the Acting Solicitor admits the Constitution does not recognize Indian tribes as governmental entities,[5] he argues that "surviving Indian prerogatives (like the taxing power) which are not mentioned in any statute are, as against all but the United State itself, 'constitutional rights' in the same sense as that term is customarily applied to other privileges secured against abridgement by one government or another."[6] In essence, the argument is that although the Constitution does not recognize or restrict the use of governmental power by Indian tribes, tribes should nevertheless have the jurisdiction of constitutionally recognized government.[7] The Acting Solicitor makes this argument in spite

---

[4] See Merrion Brief-in-Chief, p. 7-12; Amicus Brief of the Salt River Project Agricultural and Power District, pp. 4-7.

[5] Act.Sol.Supp.Br., pp. 6-7, n.2.

[6] Act.Sol.Supp.Br., p. 7, n.2.

[7] Although the Deputy Solicitor argued that tribal taxes will not be used to exploit non-Indians because they must be approved by the

of the fact non-Indians are expressly precluded from any participation in any tribal organizations.[8] Indeed, adoption of the potentially coercive tribal civil authority urged by the Acting Solicitor would allow Indian tribes to deprive non-Indians of the very civil rights he is so solicitous of protecting. (Act. Sol.Supp.Br., p. 6)[9]

Secretary of the Interior, (Oral Argument Tr. 41) the Interior Department has previously argued it has no authority to, and will not, review tribal taxes imposed on non-Indians. *Southland Royalty Company* v. *Navajo Tribe*, C 79-140 (D. Utah), appeals pending No. 80-2035 *et seq.* (10th Cir. 1980); Tr. March 13, 1980 pp. 70-73, appended hereto, Appendix A-1 *ff.* Moreover, the Jicarillas themselves have repeatedly argued that if the Secretary makes a decision which affects the Tribe, such decision is not subject to judicial review since the Tribe is an indispensable party and, because of its claimed sovereign immunity, cannot be sued. See, *e.g.*, Jicarilla Motion to Dismiss, *Conoco* v. *Andrus*, No. 80-261 C (D.N.M.) appended hereto, Appendix, A-5 *ff.* Even if the Secretary were inclined to restrain tribal taxation, however, this Court long ago rejected mere promises that local taxation would never be abused. *Brown* v. *Maryland*, 25 U.S. [12 Wheat.] 419, 439 (1827). Indeed, as Chief Justice Marshall observed, "the power of taxation is not confined to the people or property of a state. It may be exercised upon every object brought within its jurisdiction [and] to the utmost extent to which the government may choose to carry it." *McCulloch* v. *Maryland*, 17 U.S. [4 Wheat.] 316, 429, 428 (1819). *Cf.*, *Commonwealth Edison Co.* v. *Montana*, 450 U.S. . . ., 101 S.Ct. 2946, 69 L.Ed.2d 884 (1981).

[8] For further discussion of the Constitutional implications of this restriction on participation in tribal affairs, see the dissent of Chief Judge Seth below, (J.A. 169); Merrion Brief In Chief, pp. 35-41.

[9] Moreover, this argument is contrary to a long line of legal opinions from the Executive Branch that, because of their dependent status, Indian tribes do not have the power to tax non-Indians operating on an Indian reservation with federal approval. *Right of the Cherokees to Impose Taxes on Traders*, 1 Op. Atty. Gen. 645, (1824); *Memorandum of the Solicitor to the Commissioner of Indian Affairs*, June 3, 1941; *Choctaw and Chickasaw Permit Laws*, 18 Op. Atty. Gen. 34 (1884). *Cf.*, *Regulation of Traders on the Navajo Reservation*, 60 I.D. 176 (1948).

The Jicarilla position herein provides a good example of the potential abuse of the taxation power, by a "sovereign" unlimited by Constitutional restraints. The only restriction the Jicarilla Tribe recognizes on tribal taxation is that it apply to activities actually being conducted by non-Indians since it obviously would be "futile for the Tribe to levy a manufacturer's excise tax, if there is no manufacturing on the reservation". (Jic.Supp.Br., p.8) The Tribe compares its sovereignty to that of the state and federal governments (*Id.* pp. 9-10) but refuses to accept the Constitutional limits that restrain those governments.[10]

However, in *Montana* v. *United States*, 450 U.S. . . ., 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981), this Court again recognized that Indian tribes could exercise "sovereignty" over non-Indians in only three situations: (1) where Congress had expressly delegated federal authority to the tribe (2) as a proprietary right and (3) when non-Indians had expressly consented to such tribal "sovereignty."

In *Montana*, Justice Stewart gave several specific examples of situations in which Indian tribes could exercise "sovereignty" over non-Indians when Congress had expressly delegated them such authority. 450 U.S. . . ., 101 S.Ct. at 1258, 67 L.Ed.2d at 509-10. He noted the Allotment Act, by which the non-Indians obtained the right to enter the Crow Reservation, contained no delegation of governmental authority to regulate non-Indians:

> There is simply no suggestion in the legislative history that Congress intended that the non-Indians who would settle upon alienated allotted lands would be subject to tribal

---

[10] The lack of Constitutional restraints on tribal taxation was also recognized in a case relied upon heavily by the Jicarilla Apache Tribe, *Barta* v. *Oglala Sioux Tribe*, 259 F.2d 553 (8th Cir.), cert. den. 358 U.S. 932 (1958).

> regulatory authority. 450 U.S. . . ., 101 S.Ct. at 1255, 67 L.Ed.2d at 507, n. 9.[11]

The *Montana* case also reaffirmed that Indian tribes, like other property owners, have certain proprietary powers. These cannot, however, be extended to create coercive governmental authority over outsiders.[12] Quoting from a Congressional report, Justice Stewart emphasized that such proprietary powers are not the same as governmental sovereignty:

> "Indian property owners should have the same protection as other property owners, [sic], for example, a private hunting club may keep non-members off its game lands or it may issue a permit for a fee. One who comes on such lands without permission may be prosecuted under State law but a non-Indian trespasser on an Indian reservation enjoys immunity." 450 U.S. . . ., 101 S.Ct. 1256, 67 L.Ed.2d at 508, n. 11.

Justice Stewart recognized, however, that non-members who had federally sanctioned property interests could not be subjected to tribal regulations, 450 U.S. . . ., 101 S.Ct. at 1257, 67 L.Ed.2d at 508-9. Clearly Petitioners, who have federally sanctioned leases, cannot be subjected to the Jicarilla tax as condition to their continued operation on the Reservation.

The *Montana* Court then considered the third foundation of tribal power over non-Indians, "consensual relationships:"

---

[11] Rather than claiming delegated authority, the Jicarilla Tribe is arguing that the Interior Department has failed to protect "tribal" resources. (Jic.Supp.Br., pp. 1-4) and it must therefore act independently of the federal government.

[12] 450 U.S. . . ., 101 S.Ct. 15 1253, 67 L.Ed.2d at 505, see also *Cherokee Nation* v *Southern Kansas Railway Co.*, 135 U.S. 641 (1890). Application of this rule to the Jicarilla Apache Tribe which had not exercised governmental sovereignty over their territory prior to the time it was annexed to the United States under the Treaty of Guadalupe Hildalgo is particularly appropriate. See Merrion Brief in Chief, pp. 22-23; *Official Mexican Attitudes Toward the Indians; An Historical Essay*, 54 Tul. L.R. 964 (1980).

> A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. 450 U.S. . . ., 101 S.Ct. at 1258, 67 L.Ed.2d at 510.

In finding that tribes have the power to regulate non-Indians through consensual relationships, it is significant that *Montana* v. *United States* relied upon *Washington* v. *Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980). The *Colville* case considered tribal taxation in the context of the classic "consensual relation." If non-Indians wished to purchase cigarettes on the Indian reservations, they were required to pay the tribal "tax." Non-Indians, even those living on the reservation, wishing to avoid the tribal tax could merely "travel elsewhere" to purchase their cigarettes.[13]

Petitioners have never denied that the Jicarilla Tribe is entitled to regulate reservation activities by non-Indians through any means which are contractually acceptable to both parties. Petitioners did not, however, consent to the Jicarilla Tribe changing the contractual rate of royalties by imposing a "severance tax." Indeed, Petitioners have consistently maintained the Tribal "tax" is really a unilateral increase in royalties, prohibited by both the leases and federal law.[14]

POINT II

THE HISTORICAL RELATIONSHIP BETWEEN A SPECIFIC INDIAN TRIBE AND THE UNITED STATES IS

---

[13] 447 U.S. at 158. As in the *Montana* case, the Court in *Colville* also expressly recognized that the relevant treaties could "be read to recognize inherent tribal power to exclude non-Indians or impose conditions on those permitted to enter . . ." 447 U.S. at 156.

[14] Merrion Brief in Chief, pp. 26, 33. Indeed the Jicarilla Tribe now admits it adopted the Severance Tax only after it was unable to force the Interior Department to seek additional royalties (Jic.Supp.Br., pp. 4-5)

SIGNIFICANT IN DETERMINING THE TRIBE'S PRESENT RIGHTS AND POWERS.

The Acting Solicitor's contention that Congress and this Court have treated Indian tribes uniformly in spite of their historical origins or the nature of their treaty compacts with the United States is inaccurate.[15] A review of Title 25 of the United States Code indicates that Congress very rarely promulgates laws which apply universally to all Indian tribes.[16] Furthermore, it is clear that Congress has specifically recognized a distinction between those reservations created by Executive Orders, and those created by treaty with regard to taxation of oil and gas production.[17] *British-American Oil Producing Co.* v. *Board of Equalization*, 299 U.S. 159, reh. den. 299 U.S. 624 (1936).

Like Congress, this Court has considered the historical origins of each tribe's relation to the federal government at length prior to attempting to determine the specific powers possessed by that tribe.[18] Such an analysis is clearly necessary to determine the first two foundations of tribal "sovereignty", to-wit: (a) the nature and extent of any federally delegated power and (b) the extent of that tribe's proprietary rights.

---

[15] Act.Sol.Supp.Br., pp.3-5. Indeed the Jicarilla Tribe now attempts to use its own unique historical relationship to argue that its tax is justified on the basis that the Secretary of the Interior has breached his obligation to the Tribe. Jic.Supp.Br., p.5.

[16] See e.g. 25 USC § 232, 375, 416, 491, 589, 590c, 594, 609, 642, 648, 659, 668, 676, 690, 695, 749, 788, 882, 883, 898, 1087. Indeed, in least one area, Congress has adopted a special statutory plan just for the Jicarilla Apache Tribe. 25 USC § 1271.

[17] See 25 USC § 398c.

[18] See, *e.g.*, *United States* v. *Sioux Nation of Indians*, 448 U.S. 371 (1980); *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191 (1978); *Washington* v. *Fishing Vessel Association*, 443 U.S. 658 (1979). Indeed the *Montana* opinion distinguished between the Choctaw and Crow Tribes with regard to state jurisdiction over the beds of navigable rivers located on their reservations, on the basis of their proprietary powers as recognized by their various treaties. 450 US . . ., 101 S.Ct. at 1253, 67 L.Ed.2d at 504, n. 5.

The Acting Solicitor next claims that there can be no distinction between the powers and rights of an Executive Order tribe and those of a treaty tribe since "the governmental powers of Indian Tribes, for the most part, are not derived from a federal delegation, but represent the residuum of aboriginal sovereignty." (Act.Sol.Supp.Br., p. 3) In support of this proposition, the Acting Solicitor cites *United States* v. *Wheeler*, 435 U.S. 313 (1978). In *Wheeler*, the Court held that an Indian tribe had the right to impose criminal sanctions on tribal *members* for crimes committed on the reservation. This case does involve the question of whether Indian tribes have some internal authority in matters relating to relations between tribal members. As the *Wheeler* opinion recognized however, "The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and non members of the tribe." 435 U.S. at 326. Petitioners agree with the Acting Solicitor that this "divesture of sovereignty ... between an Indian tribe and non members of the tribe" should apply equally to Executive Order and treaty tribes.

The Acting Solicitor constructs an elaborate straw man based on the premise that the Jicarilla Apache Tribe has not lost its power to tax non-Indians through its failure to exercise this asserted power until 1976. (Act.Sol.Supp.Br., pp. 5-12) This argument misses the mark entirely. Petitioners do not argue that the Jicarillas lost tribal power by failure to exercise it, but rather that they never had any such power. The fact that the Jicarilla Tribe never attempted to impose taxation prior to 1976 is significant because it indicates that prior to that period, it never occurred to the Tribe, or anyone else, that it had any such power.[19]

---

[19] The Jicarilla's failure to attempt taxation, even though their counsel asserts that they have exercised tribal sovereignty since 1849 and the "inherent tribal power to tax" was clearly upheld as early as 1905 (Jic.Br. pp. 13-14; Act.Sol.Supp.Br., p. 9), indicates that the Jicarilla "severance tax" is a direct attempt to profit from the energy crisis. As oil and gas prices have risen, Jicarilla revenue based thereon has risen proportionally. Contrary to representations

POINT III

CONGRESS EVIDENCED AN INTENT THROUGH THE PASSAGE OF 25 USC § 398c TO ALLOW STATES TO TAX OIL AND GAS PRODUCED ON EXECUTIVE ORDER INDIAN LANDS AND TO COMPENSATE THE TRIBES THROUGH ROYALTIES.

Petitioners have outlined the history of Congressional compromise on 25 USC. § 398c at length.[20] The Acting Solicitor, mistakenly, argues, "allowing State taxation of the *lessee's* interest was never a contested issue. Every proposal included that feature, and no one suggested that this pre-empted tribal taxation." (Act.Sol.Supp.Br., p. 12) In fact, taxation of the lessee's interest was a hotly contested issue and several versions of this statute did not include "that feature"![21]

The Acting Solicitor also contends that in 1927 Congress was not aware of "the tribal prerogative now asserted." (Act. Sol.Supp.Br., p. 10) This contradicts the earlier assertions of both the Tribe and the Solicitor that Tribes have always had the power to tax non-Indians and that such power was widely recognized by the courts before the turn of the century.[22] The argument also ignores the fact that prior to 1927 Congress had specifically delegated authority in 1904 to collect taxes from

---

at oral argument that the Tribe was locked into leases "issued in 1953 when conditions were quite different from the conditions prevailing at this time" (oral argument, Tr. 27), the Jicarilla share in each of these leases is based on a percentage, ranging from 12½ to 50%, of the value of the oil and gas produced. This is in addition to the substantial bonuses and rentals paid by Petitioners.

[20] See Merrion Brief in Chief, pp. 29-35, Merrion Reply Br., pp. 14-17, Amoco Brief in Chief, pp. 16-23. See also, the Dissenting Opinion of Judge Barrett below (J.A. 186).

[21] S 876, S 1653, 68th Cong., 1st Sess. (1924); 66 Cong. Rec. 999 (1924); 66 Cong. Rec. 2799, 5433 (1925); HR 9133, 69th Cong. 1st Sess. (1926); S 1722, 69th Cong. 1st Sess. (1926); S 3159, 69th Cong. 1st Sess. (1926); 67 Cong. Rec. 10912, 10397 (1926).

[22] Jic.Supp.Br., p. 13; Act. Sol.Supp.Br., pp. 9-12.

grantees of rights-of-way on Indian reservations when it felt it was appropriate. 25 USC §319, §321. The argument is likewise inconsistent with the long settled doctrine that in adopting legislation, Congress may be presumed to be aware of "the legal status quo." *Cannon* v. *University of Chicago*, 441 U.S. 677 (1979); *St. Louis, I.M. & S.R. Co.* v. *United States*, 251 U.S. 198, 207 (1920).

The Acting Solicitor's assertion that, "The division of the Tribe's royalties obviously has no effect on the taxation of the lessee's quite separate interest",[23] is contrary to economic fact. Insofar as the Tribe and the State have to divide the total revenue produced from oil and gas production, and production will be continued only insofar as it is economic, an increase in taxation or royalty by either the State or the Tribe may have a repressive effect upon continued production and ultimately upon the toal revenue of either or both entities.[24]

Indeed, this argument demonstrates that the Acting Solicitor misses the significance of 25 USC §398(c) entirely. This statute is evidence that with regard to Executive Order Reservations, (1) Congress did not delegate Indian tribes any power to tax oil and gas production and (2) Congress recognized such tribes did

---

[23] Act.Sol.Supp.Br., p. 12.

[24] For a further discussion of the negative impact of tribal taxation on state revenues, see Amicus Brief filed by New Mexico, North Dakota, Utah and Wyoming; *Crow Tribe of Indians* v. *State of Montana*, 650 F.2d 1104 (9th Cir. 1981). This problem was specifically recognized by Congress during the debate on 25 USC 398c, Hearings before Subcommittee of the Committee on Indian Affairs on H.R. 9133, pp. 26-8, 69th Cong., 1st Sess. (1926). The fallacy of this position was also recognized in *Tenth Circuit Survey: Lands and Natural Resources*, 58 Den. L. J. 415, 422 (1981).

not possess any power based on their proprietary interest.[25] The provisions of 25 USC §398(c) illustrate that Congress intended to authorize the States, not the Tribes, to obtain governmental revenues via taxation of oil and gas production.

[25] The existence of a tribal proprietary interest in Executive Order Reservations is indeed doubtful, as even the Acting Solicitor recognizes. Act.Sol.Br. p. 3. There is a serious question regarding the President's authority unilaterally to create an Indian Reservation without consulting Congress. *Sioux Tribe of Indians* v. *U.S.*, 94 Ct. Cl. 150, *aff'd* 316 U.S. 317 (1942).

CONCLUSION

For the foregoing reasons and for the reasons set forth in Petitioners' brief on the merits and in the Petition for Writ of Certiorari in cause No. 80-11, the opinion of the Court of Appeals for the Tenth Circuit should be reversed, and the Jicarilla Apache Tribe severance tax ordinance should be declared unlawful and void.

Dated: 21 October, 1981 A.D.

Respectively submitted,

JASON W. KELLAHIN
KELLAHIN & KELLAHIN

Post Office Box 1769
Santa Fe, New Mexico 87501
(505) 982-4285

BRUCE DOUGLAS BLACK
CAMPBELL, BYRD & BLACK

Post Office Box 2208
Santa Fe, New Mexico 87501
(505) 988-4421

THOMAS H. BURTON
JOHN WIMBISH

Post Office Box 2197
Houston, Texas 77001
(713) 965-1030, (713) 965-1100

Counsel for Petitioners

SPECIAL APPENDIX

(SUPPLEMENTING AND MODIFYING SPECIAL APPENDIX LIST OF CORPORATE SUBSIDIARIES AND AFFILIATES OF CORPORATE PETITIONERS PURSUANT TO AMENDED RULE 28.1, RULES OF THE SUPREME COURT OF THE UNITED STATES)

The following changes in listings of corporate parent companies, subsidiaries (other than wholly owned subsidiaries), and affiliates, of the corporate petitioners should be noted. Otherwise, the parents, subsidiaries and affiliates are the same as [illegible] the "Special Appendix List of Corporate Subsidiaries and Affiliates of Corporate Petitioners pursuant to Amended Rule 28.1, Rules of the Supreme Court of the United States", previously filed herein.

Chace Oil Company: Chace Oil Company is a wholly-owned subsidiary of Cobb Resources Corporation, a New Mexico Corporation.

Tesoro Petroleum Corporation: Tesoro holds the previously listed subsidiaries; however, it now holds preferred stock and debentures of Corco convertible to common stock. If converted, Tesoro would own approximately 27.5% of the common stock of Corco.

Phillips Petroleum Company: In addition to the previous listing of subsidiaries and affiliates for Phillips Petroleum Company, the following are now included:

Acurex Solar Corporation
Chisholm Pipeline Company
Heat Transfer Research, Inc.
International Energy, Ltd.
Oil Insurance Ltd., (NEW)
Phillips Petroleum International Andina, S.A.
Salk Institute Biotechnology/Industrial Associates, Inc.
Texas Offshore Port, Inc.
Venezoil, C.A.

From the previous listing, the following are not now subsidiaries or affiliates:

Alyeska Enterprises, Inc.
LeeFac, Inc.
Powder River Corporation
Societe de Development des Polyolefins

Tenneco Oil Company: Houston Oil & Minerals Corporation is now a partially-owned subsidiary.

Getty Oil Company: Chisholm Pipeline Company is now a subsidiary. Blue Star Petroleum (Malta) Ltd. is not now a subsidiary.

Continental Oil Company (now Conoco Inc.): Conoco Inc. is now a wholly-owned subsidiary of E. I. DuPont de Nemours and Company. Conoco Inc. does not now own as subsidiary or affiliate Hudson's Bay Oil and Gas Company Limited or its subsidiaries previously listed at Page 5 of the Special Appendix.

APPENDIX

		PAGE
1.	Transcript of Argument by the Secretary of the Interior on hearing in *Southland Royalty Company* v. *The Navajo Tribe of Indians*, Civ. No. C-79-140 (D. Utah, March 13, 1980)	A-1
2.	Motion to dismiss, *Continental Oil Company* v. *Cecil D. Andrus*, Civ. No. 80-261C (D.N.M.)	A-5

IN THE

United States District Court

FOR THE DISTRICT OF UTAH CENTRAL DIVISION

Before: THE HONORABLE BRUCE S. JENKINS
UNITED STATES DISTRICT JUDGE

Case No. C79-140
C79-153
C79-237
C79-296

Transcript of:
HEARING OF MOTIONS

SOUTHLAND ROYALTY COMPANY;
PHILLIPS PETROLEUM COMPANY, et al;
THE SUPERIOR OIL COMPANY, et al;
TEXACO INC., et al,

Plaintiffs.

v.

THE NAVAJO TRIBE OF INDIANS, et al,

Defendant.

March 13, 1980
Salt Lake City, Utah

APPEARANCES

For the Plaintiff:

SOUTHLAND ROYALTY COMPANY	JOHN CREER, ESQ. BRENT WARD, ESQ.
PHILLIPS, SHELL, CHEVRON	ALAN SULLIVAN, ESQ.
SUPERIOR OIL COMPANY	ARTHUR H. NIELSEN, ESQ.
TEXACO, INC.	RICHARD CAHOON, ESQ. BRUCE BLACK, ESQ. TOM EDWARDS, ESQ.
SECRETARY OF INTERIOR	JAMES CLEAR, ESQ.
UTAH BOARD OF OIL, GAS UTAH TAX COMMISSION	MICHAEL QUEALY, ESQ. FRANK NELSON, ESQ.

For the Defendant:

HAROLD CHRISTENSEN, ESQ.
MAX WHEELER, ESQ.

[TR.70]

THE COURT: Has not?

MR. CLEAR [for the Secretary of the Interior]: He has not.

THE COURT: Why not?

MR. CLEAR: Well, as I said last time, the Secretary feels that he has statutory authority to approve — or statutory responsibility to approve and disapprove certain things such as leases. This is clearly spelled out in the statutes. No lease shall be valid unless the Secretary approves it. In that situation, obviously, the Secretary has the responsibility to act either to approve or disapprove. In other cases, and I suspect the *Jicarilla Apache* case but I'm not sure, in the tribal constitution it is required that certain resolutions will not become effective unless approved by the Secretary. In that situation the Secretary exercises a responsibility to act, too, either to approve or disapprove a resolution.

THE COURT: Or he approves ahead of time by approving the constitution which defines the boundaries.

MR. CLEAR: Yes. Right. In other words, the constitution could say let us assume in 1935 a tribe came under the constitution and said no resolutions need be approved by the Secretary. Now, he could say I don't like it. I won't approve it unless you amend it to say it will be approved, which I suspect happened. But now the constitutions are being amended to take out the approval [TR.71] requirement. Many tribes are amending the constitution so it's less and less direct. There's no requirement under any statute or under the organization doctrines or practices of the Navajo tribe which requires Secretary approval for these resolutions. So, in effect, he has no authority to act either one way or the other and that is why he has not acted on these. Now, one resolution was submitted to the Secretary for approval. I think it was the possessory interest tax resolution,

and at that time he advised the tribe that the approval of the Secretary was unnecessary for the two reasons I've mentioned. But I think *Jicarilla* indicates that if the Secretary had approved this lease this case would be thrown out.

THE COURT: Well, you may be right. My query is why hasn't he done it?

MR. CLEAR: Well, I think I've explained that. There's no statutory requirement for him to approve or disapprove this [sic] lease. And the only basis you can sue the Secretary on is for failing to perform his statutory duty. In the absence of citation to any statute which requires him to act on this resolution, there's no claim against him.

THE COURT: The only thing I wonder about is if he's duty bound to approve a constitution under a reorganization act which defines the periphery of power in which [TR.72] the reorganized tribe is to operate, why doesn't that same requirement of approval relate to laws comparable in nature to those passed by a reorganized tribe by a so-called unorganized tribe.

MR. CLEAR: Well, I think it would be similar to a constitutional amendment versus an enactment of Congress, that is, a constitutional amendment has to be approved by three-quarters of the states. But an act of Congress does not have to be because the constitution changes the form of government. And I think the same logic would follow. The Congress could say the Secretary will oversee the tribe in adopting its constitution. But if he is satisfied that the tribe can exercise independently the powers given to it in the constitution, he can waive any requirement that the individual resolutions that the tribal council passes as statutes be approved by him. I think the same rationale applies. And, again, that power, the formal power of approval spelled out in the statute applies only to tribes organizing under the Indian Reorganization Act.

But even assuming that the *Jicarilla* case doesn't address the causes of action against the Secretary in this case, I don't think there's any reason for holding further proceedings on the claims

against the Secretary. Either *Jicarilla* mandates that they be dismissed, or *Jicarilla* is [TR.73] irrelevant to it. And if *Jicarilla* is irrelevant to the claims against the Secretary, I think the case against the Secretary can be decided on the pending motions. There's no need for a trial or even summary judgment motions because the only way this Court can review the Secretary's action is on the basis of the administrative record, and there's no administrative record because he hasn't taken any action.

But in a sense, *Jicarilla* does have — well, I think basically the claims against the Secretary in these cases are that he should have approved it because what the tribe did was outside its authority, outside the tribe's authority. And I think you take that premise as the claim against the Secretary, I think *Jicarilla* clearly indicates what the tribe did in this case was within its authority, and I think that kind of in a back door fashion removes the claims against the Secretary.

Finally, there was a discussion on the effect of the —

THE COURT: But the practical problem there, if it's within their authority and he's duty bound to approve it —

MR. CLEAR: He's not duty bound to approve it.

THE COURT: Well, assuming that, and he didn't approve it, then you've got a due process problem, haven't you?

United States District Court

FOR THE DISTRICT OF NEW MEXICO

Civil No. 80-261 C

CONTINENTAL OIL COMPANY,

Plaintiff,

v.

CECIL D. ANDRUS, ET AL.,

Defendants.

MOTION TO DISMISS

Jicarilla Apache Tribe, Intervenor herein, by and through its attorneys Nordhaus, Haltom & Taylor, respectfully moves this Court to dismiss the above-captioned cause on the following grounds:

1. The Jicarilla Apache Tribe is an indispensible party under Rule 19, FRCP, which the Plaintiff has failed to join;

2. The Court lacks jurisdiction over the Jicarilla Apache Tribe. The Jicarilla Apache Tribe is immune from suit, has not waived its sovereign immunity from suit and therefore cannot be joined even though an indispensible party.

3. Pursuant to Rule 12(b)(5) and Rule 12(b)(7) FRCP, Plaintiff's Complaint should be dismissed for lack of jurisdiction over Intervenor, Jicarilla Apache Tribe and for failure to join the Jicarilla Apache Tribe as an indispensible party.

4. The Court lacks jurisdiction of the subject matter as required by Rule 12(b)(1) FRCP. The matters raised in Plaintiff's Complaint have been decided in the following actions and are therefore res judicata:

Jicarilla Apache Tribe v. *Supron Energy Company, Southland Royalty Company, Exxon Company, USA, Gas Company of New Mexico, Southern Union Gathering Company, and Secretary of the Interior*, No. 75-247M, USDCDNM.

Jicarilla Apache Tribe v. *Continental Oil Company, Exxon Company, USA, Tenneco Oil Company, Atlantic Richfield Company, Amoco Production Company, Secretary of Interior, and Southland Royalty Company*, No. 76-430P.

5. Concurrence of opposing counsel has not been requested because of the nature of this Motion.

THEREFORE, the Jicarilla Apache Tribe moves this Court to dismiss this case for all the above reasons more fully explained in its Memorandum Brief filed herein.

NORDHAUS, HALTOM & TAYLOR

By s/ B. REID HALTOM
B. REID HALTOM
Attorneys for Jicarilla Apache Tribe
810 American Bank of Commerce Complex
200 Lomas Blvd., N.W.
Albuquerque, New Mexico 87102
Tel: 505/243-4275

Certificate of Mailing

We hereby certify that a copy of the foregoing Motion to Dismiss was mailed to opposing counsel of record this 26th day of August, 1981.

s/ B. REID HALTOM
B. REID HALTOM

FILED
SEP 23 1981
ALEXANDER L. STEVAS,
CLERK

Nos. 80-11 and 80-15

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-11

J. GREGORY MERRION AND ROBERT L. BAYLESS, d/b/a/ MERRION AND BAYLESS, *et al.*, *Petitioners*,

v.

JICARILLA APACHE TRIBE, JICARILLA APACHE TRIBAL COUNCIL, AND CECIL ANDRUS, Secretary of the Interior, *Respondents*.

No. 80-15

AMOCO PRODUCTION COMPANY, AND MARATHON OIL COMPANY, *Petitioners*,

v.

JICARILLA APACHE TRIBE, *et al.*, and CECIL ANDRUS, Secretary of the Interior, *Respondents*.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

SUPPLEMENTAL BRIEF OF RESPONDENT JICARILLA APACHE TRIBE

Of Counsel:

B. REID HALTOM
MARCIA L. GREEN
NORDHAUS, HALTOM & TAYLOR
200 Lomas Blvd., N.W.
Suite 810
Albuquerque, New Mexico 87102
Telephone: (505) 243-4275

TERRY D. FARMER
MOSES, DUNN, BECKLEY, ESPINOSA & TUTHILL
200 Lomas Blvd., N.W.
Suite 800
Albuquerque, New Mexico 87102
Telephone: (505) 843-9440

ROBERT J. NORDHAUS
NORDHAUS, HALTOM & TAYLOR
200 Lomas Blvd., N.W.
Suite 810
Albuquerque, New Mexico 87102
Telephone: (505) 243-4275
Counsel of Record for Respondents Jicarilla Apache Tribe, et al.

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii, iii
I. Tribes With Mineral Resources Need Tax Revenues to Enforce Leases, Protect Reservation Environments, And Prevent Fraud And Theft In Connection With Oil And Gas Production.	2
A. The National Problem.	2
B. Enforcement Action Taken By The Jicarilla Apache Tribe	4
II. The Authority Of The Jicarilla Apache Tribe To Levy A Severance Tax Upon The Production Of Oil And Gas By Non-Member Lessees On The Reservation Is An Inherent Sovereign Power Of The Tribe Reaffirmed, Not Divested, By Congress.	7
III. Tribes Need And Are Entitled To Tax Revenues To Provide Governmental Services For Tribal Members And For Non-Members Residing Or Conducting Business On Reservations.	11
A. The Tribal Government Provides Substantial Governmental Services Benefiting Petitioners.	11
B. Tribal Power To Tax Has Not Been Preempted Or Divested.	13
IV. The Jicarilla Apache Severance Tax Does Not Violate The Commerce Clause Of The United States Constitution.	16
A. Claims Of Discrimination Against Interstate Commerce Are Without Substance.	16
B. The Tribal Tax Does Not Impose A Prohibited Burden On Commerce.	18
CONCLUSION	20
APPENDIX I. Statement of Senator John Melcher before the Select Committee on Indian Affairs, United States Senate, on Federal Supervision of Oil and Gas Leases on Indian Lands	1a
APPENDIX II. Statement of Melton J. Socolar, Acting Comptroller General of the United States, before the Commission on Fiscal Accountability of the Nation's Energy Resources on Problems Confronting the Geological Survey in Collecting Oil and Gas Royalties	9a

TABLE OF AUTHORITIES

CASES: Page

Barta v. *Oglala Sioux Tribe*, 259 F.2d 553 (8th Cir. 1958) *cert. denied*, 358 U.S. 932 (1958) 7

Bryan v. *Itasca County*, 426 U.S. 373 (1976) 15

Buster v. *Wright*, 135 F. 947 (8th Cir. 1905), *appeal dismissed*, 203 U.S. 599 (1906) 7

Clappier v. *Flynn*, 605 F.2d 519 (9th Cir. 1979) 3

Commonwealth Edison Co. v. *Montana*, 101 S.Ct. 2946 (1981) 12, 19

Complete Auto Transit, Inc. v. *Brady*, 430 U.S. 274 (1977) 19

Crow Tribe of Indians v. *State of Montana*, 650 F.2d 1104 (9th Cir. 1981) 7, 14

Exxon Corp. v. *Wisconsin Department of Revenue*, 447 U.S. 207 (1980) 19

Ford Motor Co. v. *Beauchamp*, 308 U.S. 331 (1939) 13

Heath v. *Wallace*, 138 U.S. 573 (1891) 3

Hope Natural Gas Co. v. *Hall*, 274 U.S. 284 (1927) 17

Hudson County Water Co. v. *McCarter*, 209 U.S. 349 (1908) 16

Hughes v. *Alexandria Scrap Corp.*, 426 U.S. 794 (1976) .. 16

Iron Crow v. *Oglala Sioux Tribe*, 231 F.2d 89 (8th Cir. 1956) 7

Jicarilla Apache Tribe v. *Supron Energy Corp.*, 479 F.Supp 536 (1979) 4, 5

Maxey v. *Wright*, 54 S.W. 807 (1900), *aff'd.*, 105 F. 1003 (8th Cir. 1900) 7

McCready v. *Virginia*, 94 U.S. 391 (1876) 16

Montana v. *United States*, ___ U.S. ___, 101 S.Ct. 1245 (1981) 8, 9, 10

Morris v. *Hitchcock*, 194 U.S. 384 (1904) 7

National Labor Relations Board v. *E.C. Atkins & Co.*, 331 U.S. 398 (1947) 3

Reeves, Inc. v. *Stake*, 447 U.S. 429, (1980) 16

Santa Clara Pueblo v. *Martinez*, 436 U.S. 49 (1978) 15

Table of Authorities Continued

Page

Southern Louisiana Area Rate Cases v. *Federal Power Commission*, 428 F.2d 407 (5th Cir. 1970) 3

Tempel v. *United States*, 248 U.S. 121 (1918) 3

Washington v. *Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980) 7, 9, 16

White Mountain Apache Tribe v. *Bracker*, 448 U.S. 136 (1980) 15

CONSTITUTION AND STATUTES:

United States Constitution, Article I, Section 8, Clause 3 (Commerce Clause) 16, 19

ADMINISTRATIVE DECISIONS:

79 Interior Board of Land Appeals 374, March 21, 1980 . 6

FEDERAL STATUTES:

Administrative Procedure Act, 5 U.S.C. §§ 701-706 6

Indian Reorganization Act of June 18, 1934, 25 U.S.C. §§ 461 *et seq.* 11, 13, 14, 15

Indian Self-Determination and Education Assistance Act of 1974, 25 U.S.C. §§ 450 *et seq.* 11

Mineral Leasing Act of 1927, 25 U.S.C. § 398c 13

Mineral Leasing Act of 1938, 25 U.S.C. §§ 396a-396g . 13, 14

Natural Gas Policy Act of 1978, 15 U.S.C. § 3320 11

FEDERAL REGULATIONS:

25 CFR §171.29 14

CONGRESSIONAL MATERIALS:

Omnibus Budget Reconciliation Act of 1981, House Report No. 97-208, 97th Cong. 1981 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

Nos. 80-11 and 80-15

No. 80-11

J. GREGORY MERRION AND ROBERT L. BAYLESS, d/b/a/ MERRION AND BAYLESS, *et al.*, *Petitioners*,

v.

JICARILLA APACHE TRIBE, JICARILLA APACHE TRIBAL COUNCIL, AND CECIL ANDRUS, Secretary of the Interior, *Respondents*.

No. 80-15

AMOCO PRODUCTION COMPANY, AND MARATHON OIL COMPANY, *Petitioners*,

v.

JICARILLA APACHE TRIBE, *et al.*, and CECIL ANDRUS, Secretary of the Interior, *Respondents*.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

SUPPLEMENTAL BRIEF OF RESPONDENT JICARILLA APACHE TRIBE

SUPPLEMENTAL BRIEF

This Supplemental Brief is submitted in view of the pending reargument of this case. The purpose of the Brief is to examine recent court decisions not previously considered and the deficiencies in federal supervision of oil and gas leases on Indian lands which have recently received widespread national attention. Respondent submits that failure of government agencies to provide adequate supervision of oil and gas operations on Indian trust lands emphasizes the need for tribal action to enforce oil and gas regulations and compliance with

lease provisions, and for tax revenues to enable tribal governments to provide this protection of tribal resources. Respondent endorses the arguments of the Secretary of Interior in the Secretary's Supplemental Brief filed in August 1981, and respectfully refers to the Tribe's Brief in Opposition to the Petition for Certiorari and Response Brief filed in this case.

I

Tribes With Mineral Resources Need Tax Revenues to Enforce Leases, Protect Reservation Environments, And Prevent Fraud And Theft In Connection With Oil And Gas Production

A. *The National Problem*

The nationally publicized scandal on the Wind River Reservation in Wyoming brings to public attention a condition which has existed for many years: that is, the failure of the Department of Interior to monitor and enforce lease provisions effectively on federal and Indian lands. Hearings were conducted in February, April and June, 1981, by the Select Committee on Indian Affairs of the United States Senate on "Federal Supervision of Oil and Gas Leases on Indian Lands". The statement of Senator Melcher, filed with this Brief as Appendix I, summarizes the record of maintenance of unapproved oil storage facilities, unapproved metering systems, apparent fraudulent run tickets and fraudulent operation of wells, probable oil thefts, and more important, the failure of agencies of the Department of Interior to correct these problems over a number of years. The statement of Senator Melcher is supported by an extensive record including statements of officials of the United States Geological Survey (USGS), official reports of oil field inspections, and correspondence with oil companies. (*See Hearings*, April 6, 1981, Part 2, pp. 209-294) [1]

[1] It is submitted that this Court may take judicial notice of statements of officials of branches of the Executive Department when these statements relate to records under their control; also as to

As a result of the evidence obtained by the Select Committee on Indian Affairs of the Senate, Secretary of Interior James G. Watt established an independent *Commission on Fiscal Accountability of the Nation's Energy Resources* to examine all relevant issues and submit findings and recommendations for stopping waste and theft associated with oil and gas production on Indian and federal lands. The first hearings before this Commission were held August 27th and 28th, 1981. Of particular interest is the statement of Milton J. Socolar, Acting Controller General of the United States on August 27, 1981 before the Commission, a copy of which is attached to this Brief as Appendix II. Mr. Socolar pointed out that numerous General Accounting Office (GAO) and Department of Interior audit reports had identified the need for improved management of USGS royalty accounting systems since 1959. The

---

statements of government agents, at hearings before independent governmental commissions such as the Commission on Fiscal Accountability of the Nation's Energy Resources. The reports and statements of witnesses before this Commission and the Senate Committees are not submitted as proof of the specific facts stated, only as to the general conditions which have had widespread publicity in the press and television and which are of great concern to the nation. The situation is similar to that considered by the Court of Appeals for the Fifth Circuit in the *Southern Louisiana Area Rate Cases* v. *Federal Power Commission*, 428 F.2d 407, 438, fn. 98 (5th Cir. 1970), in which the Court took judicial notice of public speeches of the Commissioners of the FPC as to the seriousness of the energy supply problem:

> We take judicial notice of the concerns these speeches express (citation omitted). (We do not, of course, take judicial notice of the specific facts they state for the purpose of resolving contested issues. *Id.*)

See also *Heath* v. *Wallace*, 138 U.S. 573, 578 (1891) (judicial notice of official statements made by the head of one of the branches of the Executive Department); *National Labor Relations Board* v. *E.C. Atkins & Co.*, 331 U.S. 398 (1947) (circular issued by military authorities); *Tempel* v. *United States*, 248 U.S. 121 (1918) (reports of the Secretary of War); *Clappier* v. *Flynn*, 605 F.2d 519 (9th Cir. 1979) (publication in the Federal Register relating to hospital rates).

Office of Controller General determined that the problems not only persist but have become worse in that lease account records still contain numerous errors and omissions; collection procedures are inadequate; lease accounts are still not audited on a routine basis; and unverified data are still used to compute royalties. Because of insufficient lease inspections and monitoring by the USGS, violations of regulations on federal and Indian leases — including the use of resettable meters and improperly sealed meters on storage tanks — have gone undetected.

Mr. Socolar also stated that at the time of the current review, the USGS had only 47 inspectors to review the activities of over 44,000 producing wells (App. II, p. 12a); further, automated royalty accounting system had broken down with the result that some 27,000 lease account records are inaccurate and unreliable (*Id.* at 13a). He further stated:

> In our April 1979 report, we disclosed that in 1977 alone Geological Survey did not collect about $359 million in oil and gas royalties when due. (*Id.* at 12a).
>
> On an annual basis $390 million in royalty payments may have been paid late, costing the Treasury potentially $1.6 million in additional interest cost. (*Id.* at 16a).

B. *Enforcement Action Taken By The Jicarilla Apache Tribe*

Faced with similar problems, the Jicarilla Apache Tribe made demands on the Secretary of Interior to enforce various lease provisions as early as 1973, and in 1975 and 1976 initiated litigation against a number of the major oil and gas producers on the reservation and the Secretary of Interior to enforce compliance with lease terms. The action of the Tribe was noted by Judge Edwin L. Mechem of the United States District Court, District of New Mexico, in his Opinion in *Jicarilla Apache Tribe* v. *Supron Energy Corp.*, 479 F.Supp. 536, 540 (1979). The Court said:

> Prior to the institution of this action, the Tribe demanded in 1973 that the Secretary take appropriate and necessary action to make determinations required of him under the

terms of the lease and to require lessees to perform their obligations as denominated in the lease provisions. The Tribe has continued to demand action of the Secretary since 1973. When it became clear to the Tribe that, in its opinion, its demands would not be heeded by the Secretary, it instituted this action in 1975. In addition to its demands on the Secretary, the Tribe has previously demanded of defendants-lessees that they pay royalties on gas produced based on actual value of such gas, that they account separately for liquid hydrocarbon substances as required by the lease terms, that they drill such offset wells as are necessary to protect lease lands from drainage, and that they exercise reasonable diligence in the development of oil and gas, while products can be secured in paying quantities, of leases held by these lessees on Reservation lands.

In the *Supron* case, the Tribe settled with Southern Union Gas Company and Southern Union Gathering Company. *See* 479 F.Supp. at 538. The Tribe's common law claims against the other Defendants — Supron, Southland Royalty Company and Exxon Co., U.S.A. — were upheld by the Court. The Court made extensive findings as to breach of fiduciary obligation by the Secretary with respect to failures to require diligent development of leases (*Id.* at 547); to protect tribal leases from drainage by requiring the drilling of offset wells (*Id.* at 548); and to require accurate accounting for value according to the terms of the leases (*Id.* at 551-52). Final judgment assessing additional royalties against the corporate Defendants was entered in that case June 1, 1981, and is now being appealed by all the parties to the Court of Appeals for the Tenth Circuit.

During the pendency of the *Supron* case and other cases, the USGS Supervisor in Albuquerque assessed additional royalties against a number of the companies based on determinations of value of gas higher than that reported by the companies. The action of the Supervisor was appealed to the Commissioner of Indian Affairs and then to the Interior Board of Land Appeals. Action of the Supervisor was upheld by the Board of Land Appeals in a decision important for

tribes throughout the country in establishing standards for determining value of royalties and requiring initiation of a dual accounting system for gas and liquids extracted from gas from those producers operating liquids extraction plants. 79 IBLA 374, March 21, 1980. The companies have filed suit for review of that decision under the Administrative Procedure Act, 5 U.S.C. §§ 701-706, in the United States District Court, District of New Mexico.

Costs to the Tribe of enforcing lease provisions because of the failure of the agencies of the Department of Interior to do so have been substantial. A question was posed at oral argument before the Court in March as to why tribes had not exercised the power of tax until recently (Tr. at 33). In answer to this question, it is submitted that tribal powers to regulate activities on reservations and to levy taxes to support governmental services have not been exercised because tribal officials have believed until recently that the Bureau of Indian Affairs and other agencies of the Department of Interior were providing needed services, and protecting and conserving reservation lands and resources. The record shows that this protection has been lacking, not only on the Jicarilla Apache Reservation, but on Indian lands throughout the United States. This has required the tribes to develop at their own expense programs for lease enforcement and conservation and has necessitated the imposition of taxes to support those governmental programs. *See also* Respondent's Brief in Opposition to Petition for Certiorari herein, pp. 4-5.

The substantial reductions in funding for the BIA and other agencies of the Department of Interior under the Omnibus Budget Reconciliation Act of 1981 will compound existing problems. *See* House Report No. 97-208, 97th Cong. 1981.

II

The Authority of The Jicarilla Apache Tribe to Levy a Severance Tax Upon The Production of Oil and Gas by Non-Member Lessees On The Reservation is an Inherent Sovereign Power of The Tribe Reaffirmed, Not Divested, By Congress

The power of Indian tribes to tax, including power to tax non-Indians conducting activities on the reservation, is a power of tribes which has been recognized by the courts for almost 100 years. *Washington* v. *Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980); *Morris* v. *Hitchcock*, 194 U.S. 384 (1904); *Barta* v. *Oglala Sioux Tribe*, 259 F.2d 553 (8th Cir. 1958), *cert. denied*, 358 U.S. 932 (1958); *Iron Crow* v. *Oglala Sioux Tribe*, 231 F.2d 89 (8th Cir. 1956); *Buster* v. *Wright*, 135 F. 947 (8th Cir. 1905), *appeal dismissed*, 203 U.S. 599 (1906); *Maxey* v. *Wright*, 54 S.W. 807 (1900), *aff'd.*, 105 F. 1003 (8th Cir. 1900).

This Court in *Washington* v. *Colville*, *supra*, at 152 (1980), delineated the extent of tribal power to tax as follows:

> The power to tax transactions occurring on trust lands and significantly involving a tribe or its members is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law or necessary implication of their dependent status.

The Court further stated at pages 156-157:

> While the Tribes do have an interest in raising revenues for essential governmental programs, that interest is strongest when the revenues are derived from value generated on the reservation by activities involving the Tribes and when the taxpayer is the recipient of tribal services. The State also has a legitimate governmental interest in raising revenues, and that interest is likewise strongest when the tax is directed at off-reservation value and when the taxpayer is the recipient of state services.

In this context, the Court of Appeals for the Ninth Circuit in *Crow Tribe of Indians* v. *Montana*, 650 F.2d 1104, 1117 (9th

Cir. 1981), evaluated the impact of Montana's 30% severance tax on coal production on the Crow Reservation and stated:

> In this case revenue sought to be taxed by Montana may ultimately be traced to the Tribe's mineral resources, a component of the reservation land itself. This is not a case where the tribe is simply marketing a tax exemption, as where tribes seeks to sell tax-free cigarettes to non-Indians. Any substantial incursion into the revenues obtained from the sale of the Indians' land-based wealth cuts to the heart of the Tribe's ability to sustain itself.

It is submitted that the power and authority to tax non-member activities, as applied to a particular tribe, must be appropriate to the activities conducted by non-Indians on reservation lands in each case. It is futile for the Tribe to levy a manufacturer's excise tax, if there is no manufacturing on the reservation; or a tax on logging operations or the sale of timber if there is no logging or timber operation on the reservation; or a retail sales tax if there are no retail stores of consequence on the reservation; or permits for fishing and hunting if there is no fishing or hunting.

Non-Indians operating businesses on reservations complain that tribal taxes imposed upon them are not within tribal powers. In particular, Petitioners in this case also argue that a tax must be consensual where the taxpayer is already on the reservation under a valid business license, lease or contract. These Petitioners misread the doctrine of this Court as stated in *Colville* and redefined in *Montana* v. *United States*, ____ U.S. ____, 101 S.Ct. 1245, 1248 (1981) in arguing:

> The analysis of tribal rights over non-members in the tribe was discussed in Montana v. United States and is applicable to our case. Petitioners entered into a consensual relationship with the tribe. A contract which imposed the conditions of their entry and fixed the conditions for them to remain, that the royalties would be paid and provided that the rents and royalties could never be increased. (Oral Argument, March 30, 1981, Tr. 8)

Petitioners, throughout their briefs and their arguments before the Court in March of 1981, confuse the concept of consensual relationship with the Tribe or its members as stated in *Montana* v. *United States, supra,* with a concept that the taxpayer must consent to this tax. This novel argument, reinforced in their own minds by their refusal to appreciate the role of Indian governments, and their incorrect reading of this Court's decisions, is a corollary of the argument that the tribes have only a proprietary power of a landlord to place conditions on entry of non-members onto reservation territory. Once legally inside the reservation boundaries, the argument goes, these non-members have a constitutional right to operate without restrictions under the leases, contracts, licenses or other arrangements with the tribes, that their privileges are unlimited in scope and time, and the tribes have lost their power to exclude them from reservation territory or control their activities in any manner whatsoever, except for violation of a specific lease provision.

Counsel for Amoco also seek to subvert the *Colville* doctrine that the power to tax transactions occurring on trust lands significantly involving the Tribe is a fundamental attribute of sovereignty, and the principle enunciated in *Montana* v. *United States* that the Tribe may regulate through taxation the activities of non-members who enter "consensual" relationships with the Tribe or its members through commercial dealing, contracts, leases or other arrangements, by arguing that the tribes no longer have a significant interest in the lands leased to Petitioners. Counsel for Amoco stated at oral argument before this Court in March, 1981:

> But the tribe's interest, insofar as this case is concerned, has been assigned for the term of the lease and the conditions under which the petitioners are entitled to remain was spelled out in both leases, and the tribe retains no significant interest which would justify the tax in this case as was the situation in Colville. Any remaining interest would not support that conclusion. (Tr. 10.)

The oil companies would not have the temerity to advance this argument with respect to operations of lessees under state

or federal leases. They would surely concede the continuing interest of other governments in conservation of lands and resources, including the subsurface groundwater, use of the surface and the air above, and the economic well-being and general welfare of the people residing on these lands. Petitioners continue to show their contempt for Indians and Indian governments by challenging the right of Indians to take action to protect their lands, their resources and their people, even where actions of lessees threaten the "political integrity, the economic security, or the health or welfare of the Tribe." *Montana* v. *United States, supra,* at 1258.

This contempt for Indians was first exhibited by the Merrion and Bayless Petitioners when they quoted with approval from a law review in a brief filed in District Court (R. Vol. I at 46):

> "Indians do not require oil to carry on their traditional economic and social activities. There is nothing about Indian culture which contributes to the value of oil or which should instill in Indians an appreciation for the substance, apart from the revenue it provides. Oil conservation is the vital concern of the white public, not the Indian, and the accident of the oil's location beneath public lands set apart for Indians does not reduce the need for it's conservation in the interests of white culture."

The attitude of the oil companies toward Indians and Indian governments has not changed over the years. The gist of their argument is that tribes do not and should not possess the authority to protect their resources or their people from actions of non-Indian outsiders, because the protection afforded by the Department of Interior and other agencies of the United States Government provides adequate security to the tribes.

As set forth in Argument I above, however, the agencies of the United States Government with the trust responsibility for protection of tribal lands and resources have failed over the years in fulfilling their trust obligation to the tribes, and the tribes must rely on their own initiative and funds to enforce lease obligations and to protect their lands, resources and people.

Although the companies will surely argue that there is no evidence admitted into this record establishing fraud, theft or irregularities on their part, the extensive record spanning many years of admitted failures of government agencies effectively to supervise oil and gas operations, is a matter of legitimate concern to the nation and as well as to the Indian tribes. Millions of dollars worth of easily transportable oil and drip gasoline, stored in tanks in isolated areas on reservation lands, are a tempting target, day or night, for disloyal company employees or outsiders. A 5,000 gallon tank truck can pick up in an overnight excursion over 100 barrels of oil or drip gasoline worth $3,000 to $4,000. Without the help of tribal employees and tribal police, neither the federal agencies nor the companies themselves can effectively prevent fraud and theft. Responsible officials of the USGS recognize the need for cooperative programs between the states, Indian tribes and the federal government so as to limit the potential for theft or mishandling of crude oil (see statement of Dwayne Hull, Manager, North Central Region, Conservation Division, USGS, Senate Hearing, *supra*, Part I, p. 74). Petitioners should welcome the help of tribal employees, police and inspectors and support taxation by tribes to make this assistance possible.

III

Tribes Need And Are Entitled To Tax Revenues To Provide Governmental Services For Tribal Members And For Non-Members Residing Or Conducting Business On Reservations

A. *The Tribal Government Provides Substantial Governmental Services Benefitting Petitioners.*

Federal policy toward Indian tribes now favors self-determination rather than assimilation, and Indian tribes must exercise power to tax in order to support their governments. *See* the Indian Reorganization Act of 1934, 25 U.S.C. §§ 461 *et. seq.;* Indian Self-Determination and Education Assistance Act of 1974, 25 U.S.C. §§ 450 *et seq.;* Natural Gas Policy Act of 1978, 15 U.S.C. § 3320.

The Jicarilla Apache Tribe and other tribes provide substantial governmental services to non-members conducting activities on reservations, including oil and gas lessees. The evidence is uncontroverted that the agencies of the State of New Mexico provide very little service on the Jicarilla Apache reservation. (Testimony of Richard TeCube, R. Vol. VI at 263). The Tribe's Response Brief, pp. 7-8, outlined the testimony and exhibits tendered by the Tribe but denied admission as to the operation by the tribal government of a police force of more than 20 uniformed policemen with a budget paid out of tribal funds of $184,068 in fiscal 1976, compared to one New Mexico state police officer whose budget was $11,000; evidence that would have established that the Tribe furnished various services, including the operation of a community center open to Indians and non-Indians (R. Vol. VI 301-02, Den. R. 305, 306); and other services. (*Id.* at 283-84). A specific tender of proof was offered with respect to road maintenance on the reservation with the tender that the road maintenance benefits the Plaintiffs in their oil and gas operation under their leases. (*Id.* at 284, denied, *Id.* at 290). Under the doctrine enunciated in *Commonwealth Edison Co.* v. *Montana,* 101 S.Ct. 2946, 2959 (1981), no factual inquiry "into the relationship between the revenues generated by a tax and costs incurred on account of the taxed activity" is necessary to validate the tax. All that is required is that the tax be reasonably related to the taxpayers' activities or presence in the jurisdiction. Recognition of the relationship here between the Jicarilla Apache tax and the impact costs of the activities of these oil companies is inescapable.

Petitioners argue that the Tribe should expend its royalty income to provide governmental services which benefit lessees as well as tribal members. Amoco counsel argued before this Court that the record "shows that the royalty revenue to the tribe more than supports the entire tribal government" (Oral Arg., March 30, 1981, Tr. 44), an argument which seems to assert that the Tribe should assume substantial portions of the cost of exploration, development, produc-

tion, conservation and prevention of waste, environmental protection and reclamation connected with Petitioners' operations and pay these out of royalties. The theory would deny to individual tribal members the benefit of a large portion of the royalties. In view of the dire poverty of most Indians (see Respondent's Brief on Petition for Certiorari, p. 6), this position is untenable.

It is submitted that the rule in *Ford Motor Co.* v. *Beauchamp*, 308 U.S. 331, 334-335 (1939), that the "exploitation by foreign corporations of intrastate opportunities under the protection and encouragement of local government offers a basis for taxation as unrestricted as that for domestic corporations" is applicable to tribes as well as states. The doctrine of this Court that persons and corporations conducting activities within a state are required to contribute to the general cost of providing governmental services, as distinct from those costs attributable to the taxed activity, should also pertain to Indian reservations. The Jicarilla Apache Tribe, not the State of New Mexico, provides the majority of governmental services on the Jicarilla Apache Reservation, and it is not disputed that Petitioners demand and enjoy the benefits of these services.

B. *Tribal Power To Tax Has Not Been Preempted Or Divested.*

The oil companies argue that tribal power to tax, if it existed, has been preempted or divested by state taxing authority conferred by Congress in the 1927 Leasing Act, 25 U.S.C. § 398c, and further, that the comprehensive federal regulatory scheme pertaining to oil and gas leasing and operations preempts tribal regulation or taxation. A careful analysis reveals, however, that the Mineral Leasing Act of 1938, 25 U.S.C. §§ 396a-396g, under which the leases in suit were issued, established an entirely new philosophy of leasing and regulation of oil and gas operations on Indian land based on the objectives of the Indian Reorganization Act, 25 U.S.C. §§ 461 *et seq.* (1934). In fact, 25 U.S.C. § 398c is inapplicable to leases issued under the 1938 Act. See Response Brief, pp. 31-35.

The Ninth Circuit Court of Appeals in the recent case of *Crow Tribe of Indians* v. *State of Montana, supra,* decided July 13, 1981, in considering the question whether Montana's 30% severance taxes on reservation coal infringed on the Tribe's right to govern itself, analyzed the Mineral Leasing Act of 1938 as follows:

> The 1938 Act (footnote deleted) was designed to achieve three goals. (Citing legislative history) First, the Act sought to achieve uniformity in the law governing mineral leases on Indian lands. Prior law had been a statutory hodgepodge that imposed different requirements for mineral leases on different Indian lands. (footnote deleted) Second, the 1938 Act was designed to help achieve the broad policy of the Indian Reorganization Act of 1934, 25 U.S.C. §§ 461-479 (1976), that tribal governments be revitalized. In the mineral leasing context, this meant giving tribal governments control over decisions to lease their lands and over lease conditions, subject to approval of the Secretary of Interior, where before the responsibility for such decisions was lodged in large part only with the Secretary. (footnote deleted). Third, the 1938 Act was intended to encourage tribal economic development, an important objective of the Indian Reorganization Act of 1934. Prior to the 1938 Act, the leasing of Indian lands for mining purposes was governed by mining laws applicable to public lands generally. Technical requirements and complicated procedures under these laws had prevented the leasing of much of the Indians' land, thus depriving them of considerable revenue. (Citing legislative history) The 1938 Act provided that land was to be leased by the Indians on terms restricted only by regulations to be adopted by the Secretary pursuant to the Act. 650 F.2d at 1112-1113.

The Court of Appeals, in the instant case, also pointed out that Congress has expressly provided that tribes, like the Jicarilla Apache Tribe, may by constitutional or legislative means approved by the Secretary of Interior, set the terms upon which they would lease their lands and regulate the operations of the lessees (citing 25 U.S.C. § 396b). The Court also noted that 25 C.F.R. §171.29 provides that regulations pertaining to oil and gas leasing and operations "may be superseded by the

provisions of any tribal constitution, by-law or charter issued pursuant to the Indian Reorganization Act of June 18, 1934 (citing), . . . or by ordinance, resolution or other action authorized under such constitution, by-law or charter". The Court further stated: "[u]nder these circumstances we cannot conclude that Congress intended to so occupy the field of regulating leasing of tribal property for oil and gas leases that the Tribes could not impose additional burdens on lessees through exercise of the power of taxation." J.A. 160-161.

This Court has never interpreted ambiguous congressional acts to divest sovereign powers by implication. *See White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136 (1980); *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49 (1978); *Bryan* v. *Itasca County*, 426 U.S. 373 (1976); see Response Brief, pp. 27-31. The question of state power to levy severance taxes on non-Indian interests in production of oil and gas on tribal lands is not before the Court in this case. But if the Court is concerned about the impact to both state and tribal taxes, then the particularized inquiry mentioned in *White Mountain Apache Tribe* v. *Bracker*, *supra*, seems to be appropriate:

> More difficult questions arise where, as here, a State asserts authority over the conduct of non-Indians engaging in activity on the reservation. In such cases we have examined the language of the relevant federal treaties and statutes in terms of both the broad policies that underlie them and the notions of sovereignty that have developed from historical traditions of tribal independence. This inquiry is not dependent on mechanical or absolute conceptions of state or tribal sovereignty, but has called for a particularized inquiry into the nature of the state, federal and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law. 448 U.S. at 144-45.

The Tribe submits that the inquiry should focus on present day conditions and policies encouraging tribal self-determination rather than those which prevailed many years ago when Congressional policy favored termination of tribal entities and assimilation of tribal members with the general population. It

should be clear from this examination that the Tribe's power to tax the major activity on its lands which has significant impacts on the reservation is retained under the doctrine of *Colville, supra* and *Montana* v. *United States, supra.* The particularized inquiry in this case would have to be based on evidence in the record and evidence tendered by the Tribe since Petitioners failed to build a factual record which would support either divestiture or preemption of tribal authority.

IV

The Jicarilla Apache Severance Tax Does Not Violate The Commerce Clause Of The United States Constitution

A. *Claims Of Discrimination Against Interstate Commerce Are Without Substance.*

The oil companies' claim of discrimination between intrastate and interstate commerce is not supported by the evidence. Their claim is based on presumed discrimination in favor of *reservation commerce* as against *off-reservation commerce.* Their claims of discrimination are based on possible sales of oil or gas by the Tribe for consumption on the reservation for potential industrial use, which they say would result in prohibited discrimination in favor of users of the Tribe's royalty gas on the reservation as against off-reservation consumers or industries either in the State of New Mexico or outside the State of New Mexico. They conceded in oral argument that there was no discrimination at the present time (Tr. 15). Even if tribes were held to the same standards of non-discrimination against off-reservation commerce by the Indian Commerce Clause as the states are with respect to interstate commerce, the Commerce Clause would not limit the tribes' proprietary operations. See *Reeves, Inc.* v. *Stake,* 447 U.S. 429 (1980); *Hughes* v. *Alexandria Scrap Corp.,* 426 U.S. 794 (1976); *Hudson County Water Co.* v. *McCarter,* 209 U.S. 349 (1908); *McCready* v. *Virginia,* 94 U.S. 391 (1876). There is here, however, no discrimination even in favor of tribal members, who must pay the tax. As noted by the Court of Appeals (J.A. 155) the phrase "removed from tribal lands" in the

ordinance (J.A. 38) means removal from the soil, not from the reservation. The provision that the tax rate is to be applied to oil and gas "sold or transported off the reservation" means that the tax rate is applied to natural gas that is sold on the reservation or transported off the reservation before sale. The only exemption is for oil or gas used for production or received by the Tribe as royalty in kind and *used by the Tribe.* (J.A. 39). All oil and gas, including pipeline production, is measured at the wellhead. The form of Operators Remittance Report (J.A. 37) shows that the production volume is measured at the wellhead, and the tax rate and tax remitted are determined by wellhead BTU content and volume. There is no evidence whatsoever of actual or potential discrimination against off-reservation commerce. The construction of the ordinance adopted by tribal authorities should be determinative. As stated in *Hope Natural Gas Co.* v. *Hall,* 274 U.S. 284, 288 (1927):

> The plain result of the opinion and final decree is to require that the tax be computed upon the value of the gas at the well, and not otherwise. If, hereafter, executive officers disregard the approved construction and fix values upon any improper basis appropriate relief may be obtained through the courts.

The Court of Appeals viewed the District Court's reasons for holding the tax discriminatory against interstate commerce as based on the provisions exempting "royalty gas, oil or condensate taken by the Tribe in kind, and used by the Tribe" as discriminating against off-reservation commerce (J.A. 153). The Trial Court is clearly wrong. It is submitted that the District Court's conclusion of law that the tax discriminates against interstate commerce was not based on any finding which would support that conclusion, and there is no evidence in the record on which that conclusion could properly be based. Based on the record, the Tenth Circuit found no illegal discrimination in the Ordinance.

B. *The Tribal Tax Does Not Impose A Prohibited Burden On Commerce.*

The Trial Court's conclusion that the tribal tax, when added to the state tax, imposed a prohibited multiple burden on commerce, was based solely on the testimony of the witness Dugan that the total burden of the New Mexico and tribal proposed tax would be 20.4% of the price of old gas. (R. IV at 58.) The trial court accepted the proposed findings of the Petitioners and erroneously reported the combined burden to be 29% of the price of old gas. There was no evidence as to the ratio of old (low price) gas to total gas produced on the reservation or of the burden of the tax on all producers on the reservation, or of the burden on consumers, other than the report of Dr. Alfred L. Parker entitled *The Economic Impact of a Proposed Oil and Natural Gas Severance Tax*. which analyzed in detail the impact of the Jicarilla Apache severance tax on New Mexico consumers and out-of-state consumers. This study is reproduced as Appendix B to the Tribe's Brief in Opposition to the Petition for Certiorari herein and was admitted in evidence at the hearing on preliminary injunction, R. IV at 137. This evidence as to the impact of the tax, which was not rebutted, established that the tribal tax would increase the cost of gas to New Mexico consumers by 6/10ths of $.01 per MCF (App. B at 16), the cost to interstate consumers in California (a major market for interstate gas produced in New Mexico) by 3/10ths of $.01 per MCF (Id. at 18). The report stated that data was not then available to measure precisely the impact of the tribal tax on New Mexico consumers of petroleum products of the tribal tax but that it would be very small indeed (Id. at 15). As the Court of Appeals pointed out, the oil companies failed to build a factual foundation in the record herein to challenge the tax on the ground that it is not fairly related to services provided by the reservation (J.A. 154, fn.4). The Tribe's efforts to establish the relation of tribal services to the tax were objected to by Petitioners and denied by the Court as stated above.

This Court in *Commonwealth Edison Co.* v. *Montana, supra,* held that the Montana 30% severance tax should be evaluated under the test set forth in *Complete Auto Transit, Inc.* v. *Brady,* 430 U.S. 274, 279 (1977), whereby the Court stated that a state tax does not offend the Commerce Clause if it "is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State." The Court said that the fourth prong of the Complete Auto Transit test requires only that the measure of the tax be reasonably related to the extent of the taxpayer's contact with the state and as a general tax. The Montana tax was in proper proportion to Commonwealth Edison's activities within the state and therefore to its enjoyment of the opportunities and protection which the state has afforded in connection with those activities, such as "police and fire protection, the benefit of a trained work force, and the advantages of a civilized society", quoting from *Exxon Corp.* v. *Wisconsin Department of Revenue,* 447 U.S. 207, 288 (1980). As a general revenue tax, it need not be related to the value of services provided to the taxpayers and the only benefit to which the taxpayers are constitutionally entitled is that derived from their enjoyment of the privileges of living in an organized society established and safeguarded by the devotion of taxes to public purposes. *Commonwealth Edison Co.* v. *Montana, supra,* at 2957, 2959.

The Court expressly rejected Commonwealth Edison's suggestion that the Commerce Clause prohibits the states from requiring an activity connected to interstate commerce to contribute to the general cost of providing governmental services, as distinct from those costs attributable to the taxed activity. Petitioner's claims that the tribal tax violates the Commerce Clause because it imposes a prohibited burden on Indian commerce or interstate commerce should similarly be rejected.

V

Conclusion

For the reasons stated in this Brief and in the Tribe's original Brief, we submit that the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

ROBERT J. NORDHAUS
NORDHAUS, HALTOM & TAYLOR
200 Lomas Blvd., N.W.
Suite 810
Albuquerque, New Mexico 87102
Tel: (505) 243-4275
Counsel of Record for Respondents Jicarilla Apache Tribe, et al.

Of Counsel:
B. REID HALTOM
MARCIA L. GREEN
NORDHAUS, HALTOM & TAYLOR
200 Lomas Blvd., N.W.
Suite 800
Albuquerque, New Mexico 87102
Telephone: (505) 843-9440

TERRY D. FARMER
MOSES, DUNN, BECKLEY,
ESPINOSA & TUTHILL
200 Lomas Blvd., N.W.
Suite 800
Albuquerque, New Mexico 87102
Telephone: (505) 843-9440

APPENDICES TO SUPPLEMENTAL BRIEF OF RESPONDENT JICARILLA APACHE TRIBE

APPENDIX 1

OIL AND GAS LEASES ON INDIAN LANDS
(PART 2)

HEARING
BEFORE THE
SELECT COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE
NINETY-SEVENTH CONGRESS
FIRST SESSION
ON
FEDERAL SUPERVISION OF OIL AND GAS LEASES ON INDIAN LANDS

APRIL 6, 1981

WASHINGTON, D.C.

The Secretary right now is preparing to send out a letter to the leaders of the oil-producing tribes advising them of his concern and asking for their cooperation in dealing with the problem across the board. He is indeed committed to deal with the problem and so are we.

Mr. Chairman, we will try to answer whatever questions you have.

Senator GORTON. Thank you, Mr. Frederick.

Senator Melcher has an opening statement to make. We will permit him to make that now and then we will begin the questions.

Senator Melcher?

STATEMENT OF JOHN MELCHER,
A U.S. SENATOR FROM THE STATE OF MONTANA

Senator MELCHER. Thank you, Mr. Chairman.

Mr. Frederick, I am not sure how long you have been in your present position, so the statement I am making probably does not refer to your duties nor does it refer very much to Secretary Watt, whom we thought was going to be present to give us his views on this matter.

Whatever has gone wrong with USGS procedures, it cannot be very easily laid at the doorstep of this new Secretary of the Interior who has only been in the saddle for a month or so.

Secretary Watt is not here. I hope he is pursuing with vigor what he told me in my office prior to our February 27 hearing in Billings on this subject. I hope he is attempting to get on top of this subject.

I personally have been looking forward to having Secretary Watt make the same statements on public record that he made in my office on his willingness to immediately pursue all the deficiencies and the lack of attention by the U.S. Geological Survey in monitoring and overseeing the production of oil, from not only Indian leases, but from Federal leases.

I would say right at the outset that in my judgment, whatever is wrong at Wind River and oil thefts is only the pattern for what can be wrong all over the country dealing with, not just Indian leases, but with the larger problem of what is going on with supervision and monitoring in the accounting of Federal oil leases.

We have been reviewing written memoranda by U.S. Geological Survey inspectors in Wyoming who have been reporting oil thefts as far back as the early 1970's.

I have U.S. Geological Survey documents demonstrating a pattern of neglect for almost a decade in preventing widespread practices causing failure to monitor oil production.

First, failure to use seals and locks on valves to protect against thefts;

Two, using resettable meters when sealed, nonresettable meters are required to measure the oil without tampering or changes;

Three, fear of political pressure has been noted by one or more USGS inspectors as a reason for not taking vigorous steps to accurately measure and account for oil production on Federal leases;

Four, failure by USGS officials to protect their inspectors who are threatened by violence;

Five, failure to close down wells when the lease has expired;

Six, lack of inspectors on Federal and Indian leases has been noted for 10 years while additional new employees for USGS were detailed for environmental studies of lease sites but were not responsible, nor had experience to inspect for oil production, measurement and gaging;

Seven, incidents of noncompliance were not always issued by inspectors when regulations were obviously being ignored;

Eight, incidents of noncompliance were frequently never followed up, even when there was strong evidence of opportunity for oil theft; and,

Nine, although admittedly the accounting system used by USGS is archaic, to the point of Department of Interior officials noting that accurate accounting of oil production on Indian and Federal leases cannot be ascertained, no modern computer system has been installed, although discussed since 1979.

The USGS Conservation Division has demonstrated gross inability to account for production of oil on Federal and Indian leases over a period of years and there is strong evidence of dereliction of duty by a number of their employees, and individual and perhaps collective failures to make needed corrections.

The USGS memoranda from the North-Central region district offices demonstrates very clearly that reported possible thefts of oil during the past decade did not develop a system of correction until newspaper accounts, principally from the Denver Post last summer, prompted a crash program of more inspections.

But there still remains a number of weak links in inspection and enforcement procedures that cause considerable doubt as to their capability for complete and accurate accounting and enforcement of their regulations.

Oil companies, are in control on the leases to the extent that the measurement of oil moved is often done without any supervision or checking by the USGS. Operators have developed virtual control over the day-to-day, first instance of accounting and reporting of oil produced and royalty due.

While the USGS has the responsibility and authority to verify those figures, evidence from their own memorandums indicates a pattern of failure to participate and oversee measurement, gaging and enforcement of accurate meter reading of the oil removed from Federal and Indian leases.

We assume that almost all oil operators on the leases are honest and to the extent that oil is stolen, they also lose valuable property.

While the USGS is a cop on the beat in the oilfields of Federal or Indian leases, the beats are too big — one inspection per lease per year was a goal not attained in the vast, windswept, isolated oilfields in Wyoming and Montana and other portions of the North-Central region.

As demonstrated in the USGS field memorandum over the past several years the cop — the USGS inspector — even when on the beat, is a daytime cop reluctant to be in the oilfields in the night and, in some cases, threatened physically if he required enforcement of USGS regulations.

There is a pattern of ignoring reports of noncompliance from field officials in the Casper regional office. That pattern of not enforcing regulations was known at headquarters in Reston.

Dereliction of duty by this regional office and the headquarters office of the Conservation Division in Reston is evident. The degree of negligence is yet to be determined.

The loss of royalty and lease money due the United States or Indian tribes of States has not yet been calculated. There has been a pattern within the Casper regional office of holding back tighter enforcement procedures in the district offices of the region.

We shall ask for further information today on these points and we shall note for the Justice Department any possible collusion that might warrant further investigation.

As was pointed out, this is the second in the series of hearings to be held by the Select Committee on Indian Affairs on allegations of oil theft from Indian and Federal lease land.

Today's hearing will follow up on testimony taken by the committee in Billings, Mont., on February 27. During that hearing, I requested that the U.S. Geological Survey, Conservation Division, make available to the committee all of their oil handling files in the Casper district offices.

The committee has examined and cataloged this material and will today ask the U.S. Geological Survey, Conservation Division, to explain serious discrepancies between their testimony in Billings, and data from these files.

In addition, the committee has discovered discrepancies between USGS regulations governing the inspection and monitoring of Federal and Indian oil leases and the manner in which the USGS carries out its regulatory function through enforcement actions.

The USGS files, which the committee has been sifting through, raise questions about the adequacy of Government supervision and monitoring of Indian and Federal oil resources.

The committee intends, through these hearings, to find out how oil thefts have been possible and how they can be prevented on Indian reservations and Federal lands in the future.

I would like to make it clear that the Federal Government serves as a watchdog, standing guard over Indian and public resources.

It is, therefore, a Federal responsibility to ferret out any abuse of these resources and this responsibility rests mainly with the U.S. Geological Survey and includes the verification and collection of royalties due Federal and Indian lessors and the monitoring of all phases of mineral operations.

The U.S. Geological Survey is required to inspect oil and gas well drilling, producing lease sites, abandoned mines, and oil and gas meters.

If this Federal responsibility is not being met, the victims are not only Indian tribes, but all U.S. taxpayers who are being cheated out of royalties to which the Federal Government is entitled.

In addition, the States, which are entitled to one-half of all royalties from oil and gas on public lands, would be losing their share of these royalties.

It is the committee's understanding that oil thefts from Indian lands may be occurring through various techniques, including unapproved oil storage facilities, unapproved metering systems, fraudulent run tickets, or no run tickets at all, or fraudulent reporting of wells that are not producing.

In addition, there may be misrepresentation by oil reclaimers as to the amount and type of oil being reclaimed as well as the presence of improper drainage pipes on storage tanks to bypass meters.

Uppermost among the committee's concerns is that, due at least in part to manpower and money shortages as well as possible ineptness on the part of USGS, oil companies are calling many of the shots and doing whatever they please in the oil fields.

The files submitted by the USGS to the committee show that little has been done to stop these oil operators. These records, for example, show that some oil companies go out of their way to be uncooperative.

One oil company monitored the movement of Government inspectors and radioed ahead to warn its employees that the inspectors were about to arrive. The field hands then mysteriously disappeared.

Still other records show that oil operators engage in a pattern of excuse making, foot dragging, submission of late or

incomplete reports, as well as outright threats against USGS inspectors.

However, the records go on to indicate, as will be demonstrated in today's hearing, that the USGS has not made full use of whatever authority it does have.

Abuses by oil operators are met with mild or no reprisals at all from the USGS. Violations of leasing regulations have never resulted in a cancellation of a lease.

When violations are detected records indicate that verbal or written warnings are often issued and production continues. The operator is, by regulation, required to report corrections of any violation.

The USGS files indicate that independent verification through reinspection procedures are few and far between.

It is true that the USGS is not adequately staffed. The USGS has only about 45 inspectors to check more than 37,000 producing wells on Federal and Indian land nationwide. In Wyoming alone, eight inspectors must monitor more than 8,400 wells.

Last year, a request from former Assistant Secretary Joan Davenport for a supplemental appropriation of $3 million to hire additional inspectors was killed within the Department of Interior.

These are problems which the Congress must be made aware of and must do something about. Today's hearing, as well as any subsequent hearings on this subject will assist the Indian Affairs Committee in formulating recommendations to be submitted to the Senate and appropriate Federal agencies.

These recommendations will address the need to promote good management and supervision of oil and gas leases and reduce opportunities for theft and fraud to minimal levels. This will no doubt take some time and will take a substantial investment of money.

However, I am convinced that these hearings will make it clear that accurate accountability, vigorous supervision, and strict enforcement are cost beneficial to the U.S. Government.

USGS, as has been demonstrated by the files, and as we will make clear in our hearing today, has plenty of authority which is not being exercised. We are anxious to review any recommendations for greater authority to help solve these problems.

Thank you, Mr. Chairman.

APPENDIX II

UNITED STATES GENERAL ACCOUNTING OFFICE
WASHINGTON, D.C. 20548

STATEMENT OF
MILTON J. SOCOLAR
ACTING COMPTROLLER GENERAL
OF THE UNITED STATES
BEFORE THE
COMMISSION ON FISCAL ACCOUNTABILITY OF
THE NATION'S ENERGY RESOURCES
ON
PROBLEMS CONFRONTING THE GEOLOGICAL SURVEY IN
COLLECTING OIL AND GAS ROYALTIES

Mr. Chairman and Members of the Commission:

We are pleased to be here today to discuss our views on Geological Survey's oil and gas royalty accounting system — a system fraught with longstanding financial management problems. We applaud Secretary Watt's establishment of the Commission which is an important step to help resolve the royalty accounting problems that have plagued Geological Survey for over 20 years.

Geological Survey is responsible for collecting the royalty income derived from oil and gas produced on Federal and Indian lands. Royalty collections have increased rapidly in recent years primarily because of substantial increases in oil and gas prices. With oil prices decontrolled on January 30, 1981, this trend can be expected to continue. Annual royalties are expected to be $4 billion in fiscal 1982 and could grow to $22 billion by fiscal 1990.

In our 1979 report entitled "Oil and Gas Royalty Collections — Serious Financial Management Problems Need Congressional Attention" (FGMSD-79-24, April 13, 1979), we pointed out that Geological Survey was having great difficulty in accounting for and collecting Federal royalty income. On the basis of more recent work for the Chairman, Subcommittee on Commerce, Consumer and Monetary Affairs, House

Committee on Government Operations, we have determined that these problems persist.

Geological Survey is not collecting all oil and gas royalties; hundreds of millions of dollars owed the Government may be going uncollected each year. Moreover, millions of dollars in royalty income are not collected when due, thus increasing Government interest costs. Until Geological Survey improves its financial management, there can be little assurance that all royalty income due from Federal and Indian land is received.

We recognize that Geological Survey's task is complex and that it has to deal with many factors beyond its control such as the proliferation of lease interests, varying royalty rates, and complex oil and gas valuation factors. Also, the monetary amounts Geological Survey is responsible for, have grown tremendously in recent years.

Geological Survey is seeking to improve its financial management capabilities by developing a new royalty accounting system but it will be several years before the system is fully implemented. In order for the new royalty accounting system to be successful, a sustained, high priority effort is needed. Also, since the new system will not determine and collect previously uncollected royalties, Geological Survey needs to develop a separate plan to address this problem.

PERSISTENT MANAGEMENT PROBLEMS PREVENT ACCURATE COMPUTATION AND COLLECTION OF OIL AND GAS ROYALTIES

Since 1959 numerous GAO and Department of Interior audit reports have pointed out the need for improved management of Geological Survey's royalty accounting system. In our April 1979 report, we recommended both short-range and long-range alternatives to the longstanding financial management problems. On the basis of our current follow up work, we have determined that the problems discussed in our 1979 report not only persist, but have become worse.

In our current review we found that

—unverified data is still used to compute royalties,

—lease account records still contain numerous errors and omissions,

—collection procedures are still inadequate, and

—lease accounts are still not audited on a routine basis.

Geological Survey still relies upon unverified data

Geological Survey relies almost entirely on production and sales data reported by the oil and gas companies. There is little effort to verify the accuracy of the data supplied. Production reports are not regularly compared to reported sales; communication between Geological Survey accountants and field inspectors is infrequent; and lease inspections are not used to verify production. In short, the oil companies are essentially on an honor system to report accurately and to fully pay royalties when due. We have previously stressed that by matching production data against sales data, Geological Survey could identify situations where oil and gas produced was not properly accounted for. However, this matching is still not being routinely done.

The matching of production and sales information is a valuable tool, however, it has some limitations because of difficulties in matching this information, and because in most instances the same company prepares both reports. Therefore, Geological Survey must have a means to independently verify what is reported. As discussed in our April 1979 report, Geological Survey personnel who periodically inspect the well sites can evaluate the reasonableness of the production data. Also, production reports show the quantity on hand and can be analyzed to detect sudden changes in production quantities; thereby reducing Geological Survey's reliance on data provided by the oil and gas companies.

Our April 1979 report recommended that field inspection personnel assist accounting personnel in verifying the accuracy of the reported data by determining the reasonableness of inventory and sales data shown on production reports. Accounting personnel were to be informed of any discrepancies noted. The Geological Survey agreed and, in April 1979, issued instructions requiring communication and assistance between field inspection and accounting personnel when inconsistent or questionable data was reported. Even though the Geological Survey reported 28,283 field inspections during fiscal year 1980, there is no indication that field inspectors and accounting personnel have worked together to verify production. Geological Survey officials confirmed that they continue to accept as accurate what the companies report.

Also, there have been questions raised about the lease inspections themselves. Geological Survey's field inspections and monitoring were severely criticized at recent hearings before the Senate Select Committee on Indian Affairs. It was pointed out that because of Geological Survey's insufficient lease inspections and monitoring, violations on Federal and Indian leases have gone undetected. These violations included

—The use of resettable meters,

—Improperly sealed oil storage tanks and valves; and

—Inadequate supervision of lease operations of the oil and gas companies.

At the time of our current review, Geological Survey had only 47 inspectors to review the activities at over 44,000 producing wells. This limited number of inspectors is not sufficient to provide adequate coverage. Geological Survey should devote additional resources to the inspection effort and should require that field inspectors assist accounting personnel in verifying sales data. Production must be verified.

Lease account records contain numerous errors and omissions

Compounding the problem of Geological Survey's reliance on information reported by the oil and gas companies was the breakdown of its current automated royalty accounting system. Some 27,000 lease account records are inaccurate and unreliable. They cannot be used to determine if royalties due from Federal and Indian leases are properly accounted for. As a result, royalties due may not be collected in full and other royalties are not being collected timely. We have been reporting on the inaccuracy of lease account records since at least 1959.

Royalties earned and payments made are recorded in lease accounts through an automated accounting system using data reported by oil and gas companies. If the amounts due and the royalties paid in an account do not agree, the account will show a balance. Account balances result when companies

—make an error in computing the amount of royalties owed or amounts paid, or

—fail to pay or report royalties due.

The Geological Survey has also created erroneous account balances by recording charges or payments in wrong accounts and by making other clerical errors.

Our April 1979 report showed that as of July 1978 the lease account records contained numerous errors and could not be relied upon. Despite calling on Geological Survey to reconcile these differences, our recent follow up work shows that the lease account records are just as inaccurate and unreliable as they were in July 1978.

On July 31, 1978, the Geological Survey maintained 22,735 lease accounts. Of these accounts, only 6,569 did not have a balance. Of the accounts with a balance, 9,497 indicated that the amount paid was greater than the royalties due the Government. Although this condition can result from overpayments to the Government by the oil and gas companies, it

occurred more frequently because royalties due the Government were understated when company reports were not received and charges were not properly entered in the accounts. The balance of these 9,497 accounts was $49.8 million. The remaining 6,669 accounts which had balances indicated that royalties of $38.8 million were due because the amount collected was less than the amount computed as due.

To determine the accuracy of these accounts, we reviewed 714 randomly selected lease accounts for June, July and August 1977. We noted the following deficiencies which contributed to the inaccuracy of these lease account records

- In 137 cases, royalty payments totaling $258,000 were recorded in the accounts without amounts being recorded as due.
- In 245 cases, royalties totaling $471,000 were recorded as due without royalty payments being recorded.
- In 469 cases, the royalties due did not equal the royalties paid. Royalties paid exceeded the amounts recorded as due by $122,000.

On the basis of recent follow up work, we determined that lease accounts still are inaccurate. As of September 1980, 19,487 or 73 percent, of Geological Survey's 26,769 lease accounts had a balance. Of these, 9,962 accounts indicated that Geological Survey had been underpaid by $134 million; the remaining 9,525 accounts indicated, for the most part erroneously, that Geological Survey had been overpaid by $153 million.

Our follow up analysis of 275 of the 714 lease accounts we had previously analyzed, for the 3 months ending June 30, 1980, showed that

- In 115 cases, royalty payments totaling $725,336 were recorded in the accounts without corresponding amounts being recorded as due.

—In 97 cases, royalties totaling $276,569 were recorded as due without corresponding royalty payments being recorded.

—In 174 cases, the royalties due did not equal the royalties paid. Royalties paid exceeded the amounts recorded as due by $119,226.

It should be noted that these amounts do not necessarily represent underpayments or overpayments, but simply indicate that Geological Survey does not know the amounts due, and clearly indicate the serious problem Geological Survey has experienced in maintaining accurate lease account records. Because of incomplete and inaccurate data entered in these accounts, they cannot be used by Geological Survey to effectively manage royalty collections.

We previously called on Geological Survey to develop a plan for reconciling existing lease accounts and for identifying and collecting uncollected royalties. In June 1981, Geological Survey announced plans to audit 20 to 25 producers of oil and gas on Federal and Indian lands to determine the amount of underpayments and overpayments that have occurred. These companies cover half of the lease accounts maintained and account for over 80 percent of the royalties collected. The audits will cover lease transactions from the past 6 years and are expected to take 3 to 4 years to complete at an estimated cost of $3 million.

Because of the planned auditing project, the Geological Survey is not going to reconcile existing lease account records. We support Geological Survey's efforts to audit the oil and gas companies accounting records for the specific purpose of determining underpayments and overpayments. However, more needs to be done. Geological Survey needs also to develop a plan to reconcile its lease account records thereby providing a sounder financial base for the new royalty accounting system.

Royalties are not being collected when due

Another longstanding problem centers on Geological Survey's inability to assure that all royalties due are collected on time. Late payments continue to be a serious problem. As far back as 1959, we reported that all royalty payments were not received when due. In addition, in 1975 Department of Interior internal auditors recommended Geological Survey assess interest on late payments.

In our April 1979 report, we disclosed that in 1977 alone Geological Survey did not collect about $359 million in oil and gas royalties when due. We found payments were not received within the times specified in leases because:

—Geological Survey did not adequately enforce provisions calling for the timely payment of royalties, and

—Geological Survey did not impose appropriate administrative fees or interest charges on those making late payments.

To the extent the delayed collections involved additional borrowing by the Treasury, additional interest costs of $360,000 may have been incurred.

Late royalty payments continue to be experienced by the Geological Survey. Our analysis of 275 randomly selected lease accounts, drawn from the 714 lease accounts examined and reported on in our April 1979 report, showed that for the 3 months ending June 30, 1980, late payments totaled $98 million for that quarter alone. Had these delinquent payers been assessed interest charges equal to the cost of Federal borrowing they would have owed an additional $400,000 for the 3 month period alone. On an annual basis $390 million in royalty payments may have been paid late, costing the Treasury potentially $1.6 million in additional interest cost. It should be noted that our current projections for late payments and interest costs are based on the number of leases that existed in our previous review (22,735 lease accounts as of July

31, 1978). As of September 30, 1980, Geological Survey maintained 26,769 lease accounts. Considering that the number of lease accounts has increased since the 1979 report, it is reasonable to assume the dollar amount of late payments is even greater than projected.

In our April 1979 report, we called for interest to be charged on late payments. Although agreeing to do so, Geological Survey has been slow in acting. Interest was not charged on late payments applicable to offshore leases until September 1980. The Geological Survey did not provide instructions for charging interest on late payments to its field offices handling onshore oil and gas leases until June 1981, and no interest has been collected for onshore late royalty payments as of July 15, 1981.

Geological Survey has taken the first step by issuing procedures for assessing interest on late payments. Interest should be assessed at the quarterly rate required by the Treasury for delinquent debts. Assessing of interest can essentially be automated with the computer identifying late payments and computing interest charges. But until an adequate automated system is developed, with the capability of identifying late payments and computing interest charges, the agency will be faced with having to provide additional staff to do the job manually. An action plan is needed to identify staff needs and resources. Otherwise we are doubtful as to whether interest will be effectively charged in the immediate future.

Insufficient auditing of lease account records

Besides needing to establish a reliable royalty collection system, the Geological Survey must increase its auditing and monitoring of lease accounts. Geological Survey's auditing and monitoring of its lease accounts continues to be inadequate to effectively control royalty payments. As previously reported, without sufficient lease account audits, the Geological Survey is in the position of having to rely upon unverified data reported by the oil and gas industry. Without a comprehensive

auditing program longstanding financial management problems will continue.

In our 1959 report, we pointed out the importance of having an auditing program to identify and resolve deficiencies in accounting for royalties. We repeated the importance of auditing in our 1979 report. Additionally, in 1975, the Department of the Interior internal audit staff recommended increased emphasis on the auditing of lease account records.

Geological Survey recognized the importance of conducting comprehensive audits by establishing criteria that audits be performed at intervals ranging from once a year to once every 6 years, depending upon the amount of annual royalties paid. As set out by Geological Survey, audits are to represent systematic and indepth investigation and appraisal of such things as reported production and sales; oil and gas values; royalties and rentals paid; and compliance with the lease terms, and oil and gas operating regulations. Lease accounts are to be reconciled to identify misapplied or missing charges, underpayments, and overpayments that appear or should appear in the account.

It has not followed through, however, and the situation today is essentially the same as it was in 1979. In fiscal year 1980, only 5 percent of the lease accounts were audited nationwide even though the audits have proven beneficial with additional collections of over $7.7 million. Geological Survey officials have acknowledged that audit efforts continue to be inadequate and they have not been able to audit enough accounts to achieve effective control over them. For instance, the Casper and Albuquerque offices, which are responsible for over 18,000 lease accounts, completed only 92 audits during 1979 and 1980. This means that over the 2 year period only 1/2 of 1 percent of the total accounts these offices were responsible for were audited. At this rate, the 18,000 lease accounts will never be completely audited. Even at the fiscal 1980 nationwide rate of 5 percent, it would take 20 years to audit the 18,000 lease accounts in the 2 offices.

At the time of our 1979 report, Geological Survey estimated that it would reconcile all leases by 1981. However, the task essentially has not even been started. Overall efforts by Geological Survey to improve monitoring and auditing of accounts have not been successful. Audit coverage is not sufficient in terms of numbers of accounts audited, nor does it provide assurance that accounts most needing audits will be included.

According to Geological Survey officials, audit and reconciliation requests from Indian tribes, Federal agencies, companies and individual lease operators occupy available audit staff resources, causing the already insufficient audit staff to audit accounts which have not been selected on a planned or systematic basis. Also other initiatives such as monitoring newly established accounts and reviewing accounts for obvious errors have not proven effective. As we have repeatedly pointed out, lease account problems can be eliminated or reduced if problems are discovered and resolved early in the life of a new account. The Albuquerque office assigned auditors to monitor newly established accounts but abandoned this effort because of higher priority work. Newly established accounts we examined during our current review exhibited the same deficiencies as the older accounts.

Geological Survey needs to develop a comprehensive systematic plan for reconciling, auditing and monitoring lease account activities and it must identify the additional resources needed to establish and maintain a continuing auditing program. Milestones for completion of the task are needed. In this regard, the Geological Survey is hiring 130 auditors. According to Geological Survey officials, the auditors will initially be used to explain the new royalty accounting system to the oil and gas companies. In addition, the Geological Survey is still not certain if this staff increase is sufficient to audit the 27,000 existing lease accounts. In order for the auditing program to be viable the auditors must adhere to the established program and should not be routinely used for other work.

GEOLOGICAL SURVEY IS MAKING AN EFFORT TO CORRECT ITS FINANCIAL MANAGEMENT PROBLEMS

Geological Survey, recognizing that its existing accounting system was inadequate, formed a task force to recommend system improvements. The task force recommended that a new royalty accounting system be designed and implemented. As you are aware, the system is not yet operational and will not be fully designed and implemented for several years.

Geological Survey completed a feasibility study and cost benefit analysis for a new system in March 1981. It plans to award a contract in September 1981 for design of the new system. The system will be implemented in three phases over a 5 year period. The three phases consist of (1) the royalty accounting phase, (2) the production phase, which will permit the matching of production and sales data, and (3) the enhanced management phase which will center on developing quality review and management data.

The Geological Survey refers to the new royalty accounting system as a modified IRS system, in that, all data submitted will be assumed to be correct subject to extensive computer analysis, screening, and audit. The agency currently estimates that the royalty accounting phase will be fully implemented by fiscal 1983 and the production phase by fiscal 1984.

Since the new system has not yet been designed and none of the phases is operational, it is difficult to say whether it will correct Geological Survey's longstanding financial management problems in the collection of oil and gas royalties. If the system is effectively planned, designed, implemented, and adequate resources provided, Geological Survey should be better able to account for and control royalty payments. Until then, however, it seems that Geological Survey will be hard-pressed to fully carry out its royalty collection responsibilities.

Historically, Federal agencies have experienced problems in designing and implementing financial management systems because sufficient management attention has been lacking. In

order that its new system does not succumb to the problems encountered by other agencies in designing and implementing new systems, Geological Survey must have a sustained, high priority effort — one with long term top management involvement. An effective accounting and financial reporting system will result only if top management within the Department of Interior and the Geological Survey remain involved.

In summary, Geological Survey has been slow in responding to its many longstanding financial management problems. At least 20 years have gone by since GAO first reported that the Geological Survey could not assure that all royalties due from Federal and Indian leases were being collected. The Geological Survey in its efforts to design and implement a new royalty accounting system is, for the first time, placing emphasis on the need for an effective royalty management program. The ongoing impetus to redesign the system must continue and improved royalty accounting must receive top management attention for the current program to succeed.

This concludes my prepared statement. We would be happy to respond to any questions.

Office-Supreme Court, U.S.
FILED
AUG 19 1981
ALEXANDER L. STEVAS,
CLERK

Nos. 80-11 and 80-15

In the Supreme Court of the United States

OCTOBER TERM, 1980

J. GREGORY MERRION, ET AL., PETITIONERS

v.

JICARILLA APACHE TRIBE, ET AL.

AMOCO PRODUCTION COMPANY AND MARATHON OIL COMPANY, PETITIONERS

v.

JICARILLA APACHE TRIBE, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

SUPPLEMENTAL BRIEF FOR THE SECRETARY OF THE INTERIOR

LAWRENCE G. WALLACE
Acting Solicitor General
CAROL E. DINKINS
Assistant Attorney General
LOUIS F. CLAIBORNE
Deputy Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF CONTENTS

	Page
1. The establishment of the Jicarilla Reservation by Executive Order as affecting the Tribe's power to tax	2
2. The failure of Indian Tribes to exercise, and of Congress to recognize, taxing power over non-Indians as evidence of the absence or loss of such authority	5
3. The *"ex post facto"* character of the tribal tax as an obstacle to applying it to existing lessees	13
4. The Jicarilla severance tax as discriminating against interstate or off-Reservation commerce	18
Conclusion	22

TABLE OF AUTHORITIES

Cases:

Adickes v. *Kress & Co.*, 398 U.S. 144	6
Arizona v. *California*, 373 U.S. 546	3
Brown v. *Board of Education*, 347 U.S. 483	6
Brown v. *Lane*, 232 U.S. 598	8
Buchanan v. *Warley*, 245 U.S. 60	6
Buster v. *Wright*, 135 F. 947	15, 16
Commonwealth Edison Co. v. *Montana*, No. 80-581 (July 2, 1981)	2, 11, 18
District of Columbia v. *Thompson Co.*, 346 U.S. 100	6
El Paso v. *Simmons*, 379 U.S. 497	14
Georgia v. *Rachel*, 384 U.S. 780	6
Griffin v. *Breckenridge*, 403 U.S. 88	6
Hurd v. *Hodge*, 334 U.S. 24	6
Iron Crow v. *Oglala Sioux Tribe of Pine Ridge Reservation*, 231 F.2d 89	17
Jones v. *Mayer Co.*, 392 U.S. 409	6
Mescalero Apache Tribe v. *Jones*, 411 U.S. 145	11
Montana v. *United States*, No. 79-1128 (Mar. 24, 1981)	2, 8, 11, 15
Morris v. *Hitchcock*, 194 U.S. 384, aff'g 21 App. D.C. 565	9, 16, 17, 18
Rapid Transit Corp. v. *New York*, 303 U.S. 573	14

Cases—Continued Page

Screws v. *United States*, 325 U.S. 91 6
Seminole Nation v. *United States*, 316 U.S. 286..... 8
Sioux Tribe v. *United States*, 316 U.S. 317 2
Stephens v. *Cherokee Nation*, 174 U.S. 445 8
Takahashi v. *Fish and Game Commission*, 334 U.S. 410 6
United States v. *Mosley*, 238 U.S. 383 6
United States v. *Price*, 383 U.S. 787 6
United States v. *Sioux Nation of Indians*, 448 U.S. 371 8
United States v. *Wheeler*, 435 U.S. 313 3
Ute Indians v. *United States*, 330 U.S. 169 2
Washington v. *Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134....3, 7, 10, 11, 14-15, 17
Washington v. *Fishing Vessel Ass'n*, 443 U.S. 658.. 11
Watt v. *Alaska*, No. 79-1890 (Apr. 21, 1981) 11
White Mountain Apache Tribe v. *Bracker*, 448 U.S. 136 7

Statutes:

Act of Mar. 1, 1901, ch. 676, 31 Stat. 861, 867..... 16
Curtis Act (Act of June 28, 1898, ch. 517, 30 Stat. 495 *et seq.*):
Section 14 16
Section 16 16
Section 23 16
General Allotment Act, 25 U.S.C. 331 *et seq.* 4
Indian Civil Rights Act, 25 U.S.C. 1301-1303 4
Indian Financing Act of 1974, 25 U.S.C. 1451 *et seq.* 4
Indian Reorganization Act, 25 U.S.C. 461 *et seq.*..... 4
Indian Self-Determination Act of 1975, 25 U.S.C. 450 *et seq.* 4
Indian Trader Statutes, 25 U.S.C. 261-264 4
Non-Intercourse Act, 25 U.S.C. 177 4
Public Law 280, 25 U.S.C. 1321-1326 4
15 U.S.C. (Supp. III) 3320(c)(1) 12
25 U.S.C. 211 5
25 U.S.C. 397 4
25 U.S.C. 398 4

Statutes—Continued **Page**

25 U.S.C. 398a-398d 4
25 U.S.C. 398d 2
43 U.S.C. 150 5
N.M. Stat. Ann. § 7-29-4.1 (1980 Supp.) 21

Miscellaneous:

Note, *Tribal Property Interests in Executive Order Reservations: A Compensable Indian Right*, 69 Yale L.J. 627 (1960) 2-3

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-11

J. GREGORY MERRION, ET AL., PETITIONERS

v.

JICARILLA APACHE TRIBE, ET AL.

No. 80-15

AMOCO PRODUCTION COMPANY AND
MARATHON OIL COMPANY, PETITIONERS

v.

JICARILLA APACHE TRIBE, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

SUPPLEMENTAL BRIEF FOR THE SECRETARY OF THE INTERIOR

We submit this supplemental brief in light of the Court's action in setting the case for reargument. There is, in our view, no occasion to recapitulate or revise our previous submission and we respectfully refer the Court to the brief we filed at the last Term. No intervening decision, nor any action of Congress, has cast doubt on the arguments then presented. On the contrary, two recent opinions of the Court seem to

reject at least some of the challenges previously interposed to the tribal tax under review.[1]

Yet, we must assume that there remain areas of concern. In attempting to isolate these questions here, we are guided by what the Court has written since the original briefs were submitted and by comments from the Bench during the first oral argument. Of course, these conjectures may miss the mark and we are far from suggesting that the points we now discuss are substantial. We confine our focus there simply because the other issues appear to have been definitively resolved.

1. ***The establishment of the Jicarilla Reservation by Executive Order as affecting the Tribe's power to tax.***

This Court has held that lands set aside for Indian use by Executive action alone could, at one time, be restored to the public domain without any obligation to pay compensation. *Sioux Tribe* v. *United States*, 316 U.S. 317 (1942). See, also, *Ute Indians* v. *United States*, 330 U.S. 169 (1947). Whether that remains true today is unclear. Since 1927, the President has been forbidden to disestablish or diminish Indian Reservations created by him, 25 U.S.C. 398d, and it is at least arguable that by this and subsequent legislation Congress effectively "confirmed" existing Executive Order Reservations so as to confer compensable title in the beneficiary Tribes. See Note, *Tribal*

---

[1] We refer to *Montana* v. *United States*, No. 79-1128 (Mar. 24, 1981), which seems to confirm tribal authority to tax non-Indians doing business within a Reservation in circumstances like those presented here (slip op. 19-20); and *Commonwealth Edison Co.* v. *Montana*, No. 80-581 (July 2, 1981), which appears to foreclose most of the arguments advanced by petitioners here under the Commerce Clause or the Supremacy Clause.

Property Interests in Executive Order Reservations: A Compensable Indian Right, 69 Yale L.J. 627 (1960). But, however this may be, the application of the Just Compensation Clause has no bearing whatever on the question presented here.

Indeed, it has never been doubted that Indian Tribes enjoyed the same residual sovereignty within the territory assigned to their use, regardless whether its boundaries were defined by treaty, by Act of Congress, or by Executive Order. Except in respect of the obligation to pay just compensation upon a taking, this Court has never distinguished between Indian Reservations depending on the mode of their creation. On the contrary, when such an argument was last presented here, it was given "short shrift." *Arizona* v. *California*, 373 U.S. 546, 598 (1963). And, most recently, this Court indiscriminately upheld tribal taxes imposed on sales to non-Indians within Indian Reservations, two established by treaty and another by Executive Order, without any suggestion from any quarter that the result should depend on the character of the instrument defining its boundaries. *Washington* v. *Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 152-154 (1980).

The rule could not be otherwise. As the Court has stressed, the governmental powers of Indian Tribes, for the most part, are not derived from a federal delegation, but represent the residuum of aboriginal sovereignty. *United States* v. *Wheeler*, 435 U.S. 313, 322-329 (1978). Obviously, prerogatives which do not owe their existence to any provision of treaty, or Act of Congress, or Executive Order, cannot be more or less because the tribal territory was set aside by one means rather than another. Nor can it be suggested that the President—assuming he had authority to do so—diminished tribal powers when he created Indian Reservations. Typically, as here, the Order merely

recites that designated lands are "withdrawn" from the public domain and "set apart as a reservation for the use and occupation" of the named Tribe. See 80-15 Pet. Br. App. 22a, 23a.

To be sure, Congress might have singled out Tribes whose Reservations were established by Executive Order and uniquely reduced their residual sovereignty. Not surprisingly, there is no such discriminatory legislation. For a time, it is true, it was unclear whether there was any authority for granting oil and gas leases affecting tribal lands within Indian Reservations created by Executive Order or even some established by Act of Congress. See 25 U.S.C. 397, 398; discussed in our original brief, at 21-24, and in our memorandum in opposition, at 5, n.1. But that omission was repaired in 1927, by enactment of a statute which effectively eliminated any disadvantage suffered by Indians whose Reservation had been established by Executive action—including the risk that their lands might be taken from them without Congressional intervention. 25 U.S.C. 398a-398d. In every piece of general legislation affecting Indians, including the Non-Intercourse Act, 25 U.S.C. 177, the Indian Trader Statutes, 25 U.S.C. 261-264, the General Allotment Act, 25 U.S.C. 331 *et seq.*, the Indian Reorganization Act, 25 U.S.C. 461 *et seq.*, Public Law 280, as originally enacted in 1953 and amended in 1968, 25 U.S.C. 1321-1326, the Indian Civil Rights Act, 25 U.S.C. 1301-1303, the Indian Financing Act of 1974, 25 U.S.C. 1451 *et seq.*, and the Indian Self-Determination Act of 1975, 25 U.S.C. 450 *et seq.*, no distinction is made between Tribes according to the method by which their Reservations were defined.

In sum, Congress has not created or perpetuated a category of "second-class" Indian Tribes who hold their lands by Executive deed. The opposite is true:

as early as 1918 the Legislative Branch ended the practice of so establishing Indian Reservations for Arizona and New Mexico, 25 U.S.C. 211, imposed a nationwide ban in 1919, 43 U.S.C. 150, and has assured the permanent status of such Reservations since 1927. It is far too late in the day to develop special rules for Executive Order Reservations. Nor is there any conceivable justification for so doing. It is largely an accident of history that some Tribes were confirmed in their diminished territory by formal treaty, others by agreement ratified by statute, still others by unilateral Congressional action, some by Executive implementation of more or less specific statutory directive, and, finally, a number by the Executive acting *sua sponte*. These fortuitous differences of long ago—which Congress has sought to erase and which this Court has consistently treated as irrelevant—ought not now be revived. Except as, exceptionally, special stipulations of law require it, all Indian Tribes should be conceded like governmental prerogatives within their recognized territory. Any other principle is both unworkable and unjust.

2. ***The failure of Indian Tribes to exercise, and of Congress to recognize, taxing power over non-Indians as evidence of the absence or loss of such authority.***

It may be suggested that the Jicarilla Apache lost the sovereign prerogative of taxing activities directly affecting them within their Reservation simply because they slept on their rights too long. Alternatively, the Tribe's failure to assert any such prerogative until very recently, combined with Congressional silence and Executive inaction for some years, may be taken as evidence that the claimed power never existed or did not survive dependent status. Either view must be rejected as bad law and bad history.

a. In this Court, it should be enough to advert to the consequences of such a doctrine as applied to other historically disadvantaged groups, whether blacks or women or aliens. It is hardly necessary to document the tragically long period during which the post Civil War Amendments and the legislation implementing them remained unenforced. Yet, the Court, when its jurisdiction was invoked, was not content to condemn the applicants to the status quo, even if apathy or hostility had established a seemingly permanent regime. *E.g., Brown* v. *Board of Education*, 347 U.S. 483 (1954). Nor is it only constitutional rights that are secure against erosion or loss by non-use. Even if we confine the focus to non-constitutional cases, a modest sampler of decisions "resurecting" apparently moribund civil rights statutes of the Reconstruction era sufficiently illustrates the point: *United States* v. *Mosley*, 238 U.S. 383 (1915); *Buchanan* v. *Warley*, 245 U.S. 60 (1917); *Screws* v. *United States*, 325 U.S. 91 (1945); *Hurd* v. *Hodge*, 334 U.S. 24 (1948); *Takahashi* v. *Fish and Game Commission*, 334 U.S. 410 (1948); *District of Columbia* v. *Thompson Co.*, 346 U.S. 100 (1953); *United States* v. *Price*, 383 U.S. 787 (1966); *Georgia* v. *Rachel*, 384 U.S. 780 (1966); *Jones* v. *Mayer Co.*, 392 U.S. 409 (1968); *Adickes* v. *Kress & Co.*, 398 U.S. 144 (1970); *Griffin* v. *Breckenridge*, 403 U.S. 88 (1971).

There is no reason to adopt a different rule for Indian rights.[2] Indeed, the historical pattern is much

---

[2] Although, in our submission, the survival of Indian taxing power would not be in jeopardy even if rested on an unrepealed statute, the tribal prerogative has a firmer footing. To be sure, it is well established that the residual powers of Indian Tribes neither derive from the Constitution nor are pro-

the same. In this Court, it would be presumptuous to rehearse that history in detail. But we may perhaps be justified in stressing that the red man, like the black man, and over much the same period, suffered a long eclipse that spanned the last decades of the Nineteenth Century and most of the first three of the

---

tected by it against the will of Congress. And, as this Court has recently observed, "[i]t can no longer be seriously argued that the Indian Commerce Clause, of its own force, automatically bars all state taxation of matters significantly touching the political and economic interests of the Tribes." *Washington* v. *Confederated Tribes of the Colville Indian Reservation*, *supra*, 447 U.S. at 157. It does not follow, however, as the same decision made clear, that the Clause is "entirely out of play in the field of state regulation of Indian affairs." *Id.* at 148. Indeed, in *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136 (1980), the Court expressly held that, in some circumstances, Indian sovereignty can form an "independent barrier," without benefit of pre-emptive federal legislation, to assertions of State authority over Indian Tribes or activities on their Reservations. *Id.* at 142. Whatever the limits of that principle, no one doubts that, absent delegation of federal authority, States may not abridge "fundamental attribute[s] of sovereignty" (447 U.S. at 152) which Indian Tribes retain, not because Congress has confirmed them, but simply because it has not extinguished them. Since State authority within its boundaries is circumscribed only by federal law or the Constitution itself, it seems inescapable that surviving Indian prerogatives (like the taxing power) which are not mentioned in any statute are, as against all but the United States itself, "constitutional rights" in the same sense as that term is customarily applied to other privileges secured against abridgment by one government or another. Presumably, Congress can lift the bar and permit States to curtail tribal powers—just as it can authorize State action that would otherwise violate the Interstate Commerce Clause. But, in the meanwhile, it is not inaccurate to label "constitutional" the limited immunity that Indian Tribes enjoy from State attempts to reduce their residual sovereignty.

Twentieth. Formal recognition of Indian Tribes as quasi-sovereign nations with whom treaties were appropriately negotiated ended in 1871 and, henceforth, the House of Representatives was free to respond to public pressures by using the power of the purse to diminish tribal sovereignty and reduce tribal land holdings. See *United States* v. *Sioux Nation of Indians*, 448 U.S. 371, 380-384, 417-420 (1980). For a time, many of the Tribes were effectively confined within assigned Reservations under close supervision and rendered wholly dependent on federal aid. Very soon, however, the political branches of the Government determined upon a policy of "integrating" the Indian and ending tribal existence, placing him under State jurisdiction. By 1887—ironically the date of the first Jim Crow law—that direction had been enthusiastically embraced in the General Allotment Act, whose ultimate objective was to end the "separateness" of Indian Tribes. See *Montana* v. *United States*, No. 79-1128 (Mar. 24, 1981), slip op. 13-14 n.9. Whatever the admixture of benevolence and self-interest informing it, that policy, persisting for almost half a century, did not "assimilate" the Indian, but it largely succeeded in destroying the autonomy of tribal governments—which, if they survived at all, became corrupt or, at best, tame agents of the federal bureaucracy. See, *e.g.*, *Stephens* v. *Cherokee Nation*, 174 U.S. 445, 453 (1899); *Brown* v. *Lane*, 232 U.S. 598 (1914); *Seminole Nation* v. *United States*, 316 U.S. 286, 295-308 (1942). It was not until 1928, at the earliest, that the Executive and Legislative Branches began to have second thoughts, and only in 1934 was an effective turn-about mandated by law.

b. In these circumstances, it is hardly surprising if most Indian Tribes were not, until recently, actively

exercising their remaining sovereign prerogatives. Least of all, when survival of tribal identity itself was at stake, could one expect a full assertion of governmental power over non-members who were exploiting Reservation resources. To be sure, some of the large and relatively independent Civilized Tribes of Oklahoma exercised their power to tax non-Indian activities within their Reservations as late as the turn of the Century, and they were vindicated in the courts, including this Court. See *Morris* v. *Hitchcock*, 194 U.S. 384 (1904). But, very soon, their governments were all but abolished, tribal lands were allotted, and State jurisdiction was imposed. Understandably, for some time, that example was not imitated. Gradually, most of the Tribes lost the habit of self-government and any pretension to self-sufficiency was abandoned. Typically, the Indians were grateful passively to accept often less than provident arrangements, negotiated on their behalf by federal officials, for the exploitation of what lands they retained, whether for grazing or agriculture or the cutting of timber or the extraction of minerals. Tribal enterprises were rare indeed, and tribal regulation or taxation of outside lessees was far too bold an idea to enjoy currency.

That was the prevailing climate in 1927, all the more so within Executive Order Reservations where, until that year, the Tribe's title to the reserved lands remained subject to defeasance by Executive fiat and its right to enjoy the mineral resources of the Reservation was disputed. No doubt, the Jicarillas were then far from ready to assert any taxing prerogative. And we may assume that no one else, in Congress or the Executive Branch, was adverting to that prospect. Hence, the total silence on the subject during the legislative proceedings leading

to the 1927 Act. Indeed, it was not until 1968 that the Tribe asserted a right to tax non-members engaged in business on the Reservation and only in 1976 that the power was first exercised.

c. The pattern we have sketched explains why the Jicarilla Apache, like most Indian Tribes, have only recently asserted their full governmental powers. But it does not remotely suggest the absence or loss of those prerogatives. One might equally argue that the black man lost his claim to be free of discrimination because for so long he acquiesced in its denial. Or, by a parity of reasoning, it could have been objected to the first State severance tax that it was beyond the police power because, for more than half a century before, no State had claimed such a prerogative. As it happens, moreover, tribal taxation of non-members doing business within Indian Reservations was not a novelty. As this Court recently stressed, for some time Indian Tribes asserted and exercised such taxing power with the full approval of all branches of the National Government. *Washington v. Confederated Tribes of the Colville Indian Reservation, supra,* 447 U.S. at 152-153. See, also, our original brief herein at 9-12. Unless Congress effectively changed the rules, it cannot matter that during a dark age the prerogative went unexercised.

It is not suggested that any legislation before 1927 touched tribal powers of taxation. But petitioners assert that, in that year, Congress effectively extinguished any such prerogative, if only by acting in a way that reveals no awareness of the tribal prerogative now asserted. That would be novel doctrine, indeed. Not infrequently, Congress acts without a full or accurate awareness of the legal status quo, or the potential future. But, except when there is a plain conflict, the preexisting law remains in effect, however "dormant" it may have been. It may be doubted,

for instance, whether the Congress that enacted the Mineral Leasing Act of 1920, when it preserved any existing State power to tax mineral production, contemplated that Montana would be free to collect a coal severance tax that netted greater revenues than its royalty share from federal coal. Yet, that misapprehension (as we suppose) cannot affect Montana's prerogative. *Commonwealth Edison Co.* v. *Montana*, No. 80-581 (July 2, 1981). So, also, it is probable that Members did not, in 1927, anticipate that Indian Tribes on Executive Order Reservations would, decades later, achieve a measure of self-sufficiency by taxing cigarette sales within their borders, by vindicating long unexercised commercial hunting and fishing rights or licensing them to outsiders, or by developing tourist attractions. See *Washington* v. *Confederated Tribes of the Colville Indian Reservation*, *supra*; *Washington* v. *Fishing Vessel Ass'n*, 443 U.S. 658, 668-669 & n.14 (1979); *Montana* v. *United States*, *supra*, slip op. 11; *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145 (1973). But, plainly, those privileges cannot suffer merely because Congress did not focus on their continued existence or their ultimate implementation.

d. Although there is no basis whatever for so assuming, the result would be no different if one could conclude that Congress would have revoked tribal taxing power had it thought about it. The fact is that no such decision was made—nor could have been made by legislators who were not conscious of the prerogative in question. That is the end of the matter. Only in the clearest case may one find an implied repeal of legislation. *E.g.*, *Watt* v. *Alaska*, No. 79-1890 (Apr. 21, 1981). Even stronger evidence should be required when it is not claimed that Congress took back what it had earlier given, but, rather, abrogated

residual sovereign powers existing wholly apart from any congressional grant, and did so, moreover, not by deliberate design, but by accident.

As we have elaborated in our original brief (at 18-32), there is no arguable inconsistency in conferring taxing authority on the State while leaving undisputed any comparable tribal prerogative. Nor does the legislative history of the 1927 Act invoked by petitioners suggest any exceptional departure from the usual rule. Petitioners have suggested that the Tribe's power to tax the lessee's interest was divested because, after extended consideration, Congress granted the States the power to tax that interest. But the truth is that allowing State taxation of the *lessee's* interest was never a contested issue. Every proposal included that feature, and no one suggested that this pre-empted tribal taxation. The only question that arose during congressional consideration of the legislation was how to give States something more: a share of royalties—with or without strings attached—or, as was ultimately decided, the power to tax the tribal royalty interest. See our original brief, at 24-32. The division of the Tribe's royalties obviously has no effect on the taxation of the lessee's quite separate interest. The upshot is that the Congress of 1927 did not, consciously or unconsciously, extinguish the pre-existing authority of the Jicarilla Tribe to tax the severance of their Reservation minerals. Indeed, having never considered the matter, the legislators of the time can hardly be understood to have expressed any opinion on that question. What remains of tribal autonomy is not so mysteriously manipulated out of existence, as Congress itself has more recently recognized. See 15 U.S.C. (Supp. III) 3320(c)(1).

3. *The "ex post facto" character of the tribal tax as an obstacle to applying it to existing lessees.*

Of course, the Jicarilla mineral severance tax is not remotely an *ex post facto* law in the constitutional sense: it operates only prospectively. We borrow the pejorative term only to deal with the argument of petitioners, lessees whose contracts were executed some years ago, that they would be treated unfairly if (as is the case) they, as well as any future mineral lessees, are subjected to this new burden. The suggestion, superficially appealing, is that the Tribe is impermissibly attempting to increase its share of lease benefits by labelling the incremental exaction a "tax," rather than an added royalty, barred by contract stipulations. We confront the question without attempting to rephrase it.

a. The answer does not turn on the "motive" of the Tribe: obviously, it seeks to maximize, for the benefit of all its members, the revenues derived from a depleting tribal resource. So do most responsible governments. The dispositive point is whether the Jicarilla Tribe is entitled to exercise, and is here exercising, a sovereign prerogative of taxation—as the United States or a State or a municipality might do with the same ultimate objective. If the Tribe enjoys such governmental power, it need no more explain or apologize to its contractors than do the States of New Mexico or Montana or Louisiana, or any other States, that have increased their severance tax rates as against all existing lessees, including those who hold leases on State-owned lands.[3] Only in extraor-

[3] Quite properly, petitioners conceded in the court of appeals (J.A. 161) that a fixed royalty "provision does not preclude a sovereign that is also a lessor from imposing a tax which has the practical effect of increasing its revenues." In-

dinary circumstances does a government absolutely commit itself not to impose, or increase, taxes against an invitee. Assuming such arrangements are ever binding, this plainly is not such a case. There was here no express waiver of the taxing prerogative. Nor can any such stipulation be read into the contract, even if one assumes that the lessees would have succeeded in insisting on a "no tax" clause had they thought of it. *Rapid Transit Corp.* v. *New York*, 303 U.S. 573, 590-596 (1938). Absent a "clear and unmistakable" provision, the sovereign prerogative will not be deemed surrendered. *Id.* at 590-591. See, also, *El Paso* v. *Simmons*, 379 U.S. 497 (1965).

b. Thus, we return to the central question: Does the Jicarilla taxing ordinance represent an exercise of *governmental* power, or is it no more than an attempt by a lessor unilaterally to vary the terms of a contract? The answer is not in doubt. Indeed, a year ago, eight Members of the Court expressly joined in the holding that Indian Tribes generally—including those whose Reservations were established by Executive Order—retain a "power to tax transactions occurring on trust lands and significantly involving [the] [T]ribe or its members" as "a fundamental attribute of sovereignty," since that prerogative was "not implicitly divested by virtue of the tribes' dependent status" nor by any "federal statute" indicating "any congressional departure from this view." *Washington* v. *Confederated Tribes of the Colville Indian Reservation*, *supra*, 447 U.S. at 152, 153; *id.*

---

deed, at least two of the petitioners with leases on State-owned land testified that New Mexico had recently increased its severance taxes, and that petitioners had no objection that this constituted a unilateral increase in royalties (IV R. 67, 82-83). Amicus State of Washington agrees (Br. 2-3) that the States may take such action.

at 165 (Brennan and Marshall, J.J., concurring and dissenting), 174-175 (Stewart, J., concurring and dissenting).[4] And, even more recently, the Court, without dissent on this score, reiterated that "Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands," including, specifically, authority to "regulate, through taxation * * *, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Montana* v. *United States*, *supra*, slip op. 19.

There is simply no way to read those obviously well considered and deliberate statements of the Court as conceding to Indian Tribes no more than a landowner's right to condition entry onto his property upon payment of a fee. That would hardly be the exercise of "a fundamental attribute of sovereignty" or "inherent sovereign power." Besides, in both *Colville* and *Montana*, the Court approved the ruling in *Buster* v. *Wright*, 135 F. 947 (8th Cir. 1905), which sustained tribal occupational taxes as applied to commercial activities on town sites within the Reservation which the Tribe no longer owned and from which they had been specifically prohibited from evicting the white settlers. See *id.* at 951-952, 953-954, 958. And, in the *Montana* case, slip op. 19, the Court explicitly included "non-Indian fee lands" within a Reservation as subject to tribal civil jurisdiction, although the Tribe obviously could not exclude the owners from such parcels.

---

[4] The concurring and dissenting opinion of Justice Rehnquist, *id.* at 176-190, does not mention tribal taxation, but does not dissent from the Court's holding on this question.

c. Petitioners are misled when they insist that, traditionally, tribal taxes have been no more than "optional" preconditions. Of course, all local taxation is, in one sense, a "condition" of entry, or residence, or engaging in business, within the borders of the municipality, county, or State. With respect to non-citizens, that is the usual, if not the only, justification for *any* governmental tax. It is accordingly not surprising to find such a formulation in some of the cases sustaining tribal taxes. *E.g.*, *Morris* v. *Hitchcock*, *supra*, 194 U.S. at 389. When the Tribe is both landowner and territorial sovereign, the nature of a "permit tax" may be obscured. But there can be no doubt that tribal taxes have been approved when they necessarily drew on *governmental* power.

Thus, the Chickasaw tax involved in *Morris* v. *Hitchcock* was sustained over the objection of cattle owners that the Tribe was exacting a fee in addition to the grazing rent agreed between the cattlemen and individual members of the Tribe, who, as effective owners of their lands, had been authorized to enter into such arrangements by the Curtis Act (Act of June 28, 1898, ch. 517, Sections 16 and 23, 30 Stat. 501 and 504). See 194 U.S. 384; 21 App. D.C. 565, 569, 578, 595-598 (1903). So, also, as already noted, the tax challenged in *Buster* v. *Wright* reached the activities of merchants on town sites they had actually bought and paid for and who were also subject to like municipal taxes authorized by Congress. See Section 14 of the Curtis Act, 30 Stat. 499-500, and Section 17 of the Act of Mar. 1, 1901, ch. 676, 31 Stat. 861, 867. And, finally, we should notice this Court's apparent approval, in *Morris*, of the Attorney General's ruling sustaining a Cherokee hay export tax which would be valid as applied to a shipper within the

Reservation even if he were "the absolute owner of the land on which the hay was raised." 194 U.S. at 392.

Nor has this principle lacked more recent reaffirmation. Besides the decision below, the principle of Indian taxation applying to non-members within a Reservation as "an inherent incident of * * * sovereignty" was confirmed in *Iron Crow* v. *Oglala Sioux Tribe of Pine Ridge Reservation*, 231 F.2d 89 (8th Cir. 1956), cited with approval by this Court in the *Colville* case. 447 U.S. at 153. And, of course, the *Colville* decision itself sustains tribal taxes that cannot remotely be explained as conditions precedent to entry into the Reservation, to residence there, or to setting up business on Indian lands. Among other things, the taxes applied equally to non-members of the Tribe who were permanent residents of the Reservation and could not be excluded. In sum, the Court has confirmed the continuing vitality of the proposition that Indian Tribes retain a power of taxation that is akin to that of municipal governments, that is not dependent on continuing ownership of the lands or minerals involved, and that is not frozen as of the date when outsiders obtained their privileges within the Reservation.

d. We need not press the argument further. This case does not require the Court to decide whether a Tribe may assess real property taxes against "fee lands" within Reservation boundaries, or to what extent their use may be regulated. We assert only that, unless the Tribe has been expressly divested of the power by Act of Congress or has clearly surrendered it in a given case, every Indian Tribe may tax the exploitation of tribally-owned mineral resources within its own territory. If that is so, the lessees must be deemed to have entered onto the Reservation subject

to the exercise of that prerogative and cannot complain because they assumed it would not be asserted. That is simply a risk common to all those who choose to enter another jurisdiction to do business. See *Morris* v. *Hitchcock*, *supra*, 194 U.S. at 392, 393. Petitioners do not complain that New Mexico has increased its severance tax; they have no more ground to challenge the modest Jicarilla tax. On the contrary, they can count themselves fortunate that the Tribe was so slow in asserting its undoubted prerogative, and so reasonable when it determined that the interest of future generations required some provident action before its wealth was wholly depleted.

4. ***The Jicarilla severance tax as discriminating against interstate or off-Reservation commerce.***

We turn, finally, to the claim that the Jicarilla tax is discriminatory, a point of special focus at the original argument of the case. While adhering to what has been said about the inapplicability of usual Commerce Clause analysis in the present context (see our original brief, at 35-43), we now confront the discrimination charge directly.

a. In light of the Court's intervening decision in *Commonwealth Edison Co.* v. *Montana*, *supra*, we need not rebut the allegation that the tribal tax discriminates against *interstate* commerce. If it was not settled before, it is no longer arguable that local taxation offends the Commerce Clause merely because the product, or most of it, is ultimately consumed out of state. Nor is there the slightest basis for suspecting that the Jicarillas have "tailored" their tax so that the burden will fall beyond the borders of New Mexico. That is a matter of complete indifference to the Tribe. Whatever else is ambiguous, it is entirely clear that the Jicarilla ordinance imposes the iden-

tical tax on oil and gas severed from its Reservation regardless whether it is consumed in New Mexico or in other States.

b. It is suggested, however, that the ordinance discriminates between products that leave the Reservation and those that do not. Even if this were true, we do not know what applicable rule of law would be violated. To invoke the Indian Commerce Clause against *tribal* action would be novel indeed. See our original brief, at 36-38, 41-42. But the short answer to the argument is that the premise is wrong.

In sustaining the Jicarilla ordinance, the court of appeals explicitly rejected the construction asserted by petitioners (J.A. 155):

> The clear thrust of the ordinance is that the taxable event is severance or bringing the resources to the surface. To be sure, the ordinance's phrase "severed, saved and removed from Tribal lands" is ambiguous, for the taxable event could be removal from the territorial boundaries of the reservation after severance. But we think the phrase "remove from Tribal lands" merely means removal from the soil, as the Tribe argues. This interpretation is reinforced by the explicit requirement that the taxes are due at the time of severance. Nor does the provision that the tax rate is to be applied to oil or gas "sold or transported off the Reservation," alter this conclusion. Although this phrase is also ambiguous, it would seem to mean the tax rate is applied to natural gas and oil that is sold on the reservation or transported off the reservation before sale. The only products not included in the tax computation are those used by the operators in the process of production and those received by the Tribe as royalty in kind. All other products are taxed at the time of severance.

One may speculate that the district court viewed the matter differently. But it did not say so. That court, in its Findings of Fact (No. 31, J.A. 130) and Conclusions of Law (No. 6, J.A. 132), merely reproduced the ambiguous language of the ordinance, without construing it. The Tribe, which enacted the ordinance, and the United States, which approved it, have explained its scope in a manner wholly consistent with the text,[5] and it has been sustained on that basis. That is now the authoritative construction, binding on all. In these circumstances, there is no occasion for this Court to re-interpret the operative words.

c. To be sure, as the court of appeals noted, there are two exemptions from the tax: (1) oil and gas neither sold nor exported, but "used by the operators in the process of production" (J.A. 155); and (2) "[r]oyalty gas, oil or condensate taken by the Tribe in kind, and used by the Tribe" (Ordinance § 4, J.A. 39). The first provision is commonplace in oil and gas severance tax schemes and is, in any event, not objected to. The exemption for tribal royalty oil and gas taken in kind and used by the Tribe, on the other hand, is said to work discrimination. The argument is contrived and, in any event, without substance.

We earlier answered the complaint on this score by explaining that "the Tribe, being both the owner and the taxing authority, is simply avoiding the wasteful exercise of moving revenues from one pocket to the other" (Brief, at 43). Then, as now, we assumed that, although the ordinance imposes the

---

[5] As has been said, the reason for specifying minerals "transported off the reservation," in addition to those "sold," as subject to the tax, was to reach gas extracted by producers who also owned pipelines and consummated no sales on the Reservation, while exempting oil and gas that was never sold. See IV R. 209-210.

liability on the operator at the moment of severance (§§ 1 and 5, J.A. 38-39), he was free to pass on the burden to the recipient. It was not immediately apparent how the operators could complain of an exemption from tax liability on some part of their production.[6] But petitioners have imagined a scenario under which the Tribe takes its royalty in kind and then sells it, tax-free, to their prejudice. Those fears are unfounded. The exemption, in terms, applies only to royalty oil or gas "used by the Tribe"—not to products resold to others. In short, the ordinance does not permit any preferential tax-free scheme whereby the Jicarilla Tribe could undercut its lessees in the commercial market.

In sum, under actual conditions, the Jicarilla ordinance works no discrimination whatever. All production—except only what is re-used in the extraction process—is taxed at the same rate, whether it is sold before or after it leaves the Reservation, and regardless whether it is ultimately used in New Mexico or in some other State. Nor, assuming the issue is ripe, is there any prospect of discriminatory treatment in future arrangements that we can conceive. No exemption, for instance, is given for Indian producers. And the Tribe cannot profit from its exemption by selling its share of production at tax-free rates to competitors of its lessees. We conclude that the charge of discrimination levelled against the Jicarilla ordinance is baseless.

---

[6] We note that New Mexico's oil severance law exempts the producer from paying the tax on the value of royalties due the United States, Indian Tribes, and the State itself, whether taken in money or in kind. N.M. Stat. Ann. § 7-29-4.1 (1980 Supp.).

CONCLUSION

For the reasons stated here and in our original brief, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

LAWRENCE G. WALLACE
Acting Solicitor General *

CAROL E. DINKINS
Assistant Attorney General

LOUIS F. CLAIBORNE
Deputy Solicitor General

AUGUST 1981

---

* The Solicitor General is disqualified in this case.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1981 352503 594